

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, and Notices
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

VOL. 29

JUNE 28, 1995

NO. 26

This issue contains:

U.S. Customs Service

T.D. 95-49 and 95-50

General Notices

U.S. Court of International Trade

Slip Op. 95-103 Through 95-106

**DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE**

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

U.S. Customs Service

Treasury Decisions

(T.D. 95-49)

REVOCATION OF CUSTOMS BROKER LICENSES: HOUSTON-GALVESTON CUSTOMS DISTRICT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocations.

SUMMARY: Notice is hereby given that on March 30, 1995, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), ordered the revocation of the following Customs broker licenses due to the failure of the broker to file the status report as required by 19 CFR 111.30(d). These licenses were issued in the Houston-Galveston District. The list of affected brokers, both individual and corporate, is as follows:

| <i>Customs broker</i> | <i>License No.</i> |
|-----------------------------|--------------------|
| George Anki, Jr. | 05896 |
| Lester M. Barnes, Jr. | 02448 |
| Dan Beadle | 05532 |
| Ann M. Beardsley | 07523 |
| Jane Bentley Bowers | 05859 |
| Sandra L. Brown | 09523 |
| Ernest M. Bruni | 07706 |
| Natalie L. Byrd | 11151 |
| John Howard Callaway | 07262 |
| Rodger A. Chilton | 07197 |
| James Costello | 06974 |
| David L. Elmers | 07263 |
| Arthur Oran Evans, III | 05069 |
| Margaret L. Graeff | 05480 |
| David W. Gray | 05971 |
| Arnold Gene Greathouse | 05230 |
| James A. Green, Jr. | 03928 |
| Fred M. Hall | 05393 |
| Joseph M. Hankins | 07648 |
| Gulshan Kala | 10188 |
| John William Kenehan | 05585 |
| Salvatore Lobello | 07784 |
| Jose R. Lopez | 06998 |
| Alger L. McDonald | 07829 |
| David R. McIntyre | 04747 |

| <i>Customs broker</i> | <i>License No.</i> |
|-------------------------------|--------------------|
| Adolph Kennon Meadows | 04109 |
| Jack B. Morgan | 04761 |
| William Cary Okerlund | 08042 |
| Barbara A. Painter | 06507 |
| Joseph B. Peloso | 07882 |
| Gregory L. Perun | 06119 |
| J.G. Philen, Jr. | 07082 |
| J.J. Portier | 07280 |
| Rita R. Powell | 05758 |
| Jerry E. Rojas | 05129 |
| Abelardo A. Salinas | 07901 |
| Charles H. Simpson | 05276 |
| Robert Wilbur Smith, Jr. | 03944 |
| Jose A. Soto, Jr. | 07965 |
| Benny Roy Sprayberry | 05146 |
| Scott Taylor | 07395 |
| Robert J. Villiard | 06666 |
| Phillip Andrew Walsh | 06126 |
| James A. Webster | 05525 |
| Thomas A. Weiderhold | 06027 |
| Rebecca O. Young | 09577 |
| Joe Zaragoza, Jr. | 05738 |

CORPORATE

| <i>Customs broker</i> | <i>License No.</i> |
|------------------------------------|--------------------|
| Accelerated Customs Brokers | 07504 |
| Alan Customs Service, Inc. | 08048 |
| All-Phase Freight, Inc. | 07448 |
| Cargo Express, Inc. | 11740 |
| Darrell J. Sekin Co., Inc. | 05249 |
| Davis Import Consultants | 06704 |
| Green, James A., Jr. & Co. | 04108 |
| HLZ Import Service, Inc. | 09765 |
| Jetero Int'l Services, Inc. | 07908 |
| L. Braverman & Company | 04365 |
| Livingston International Inc. | 04725 |
| McLean Cargo Specialist, Inc. | 05977 |
| Panalpina Airfreight, Inc. | 04616 |
| Salinas Forwarding Co., Inc. | 07068 |
| Sauter Corporation | 09632 |
| Shipco, Inc. | 04861 |

Dated: June 14, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, June 20, 1995 (60 FR 32209)]

(T.D. 95-50)

REVOCATION OF CUSTOMS BROKER LICENSES: LOS ANGELES CUSTOMS DISTRICT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocations.

SUMMARY: Notice is hereby given that on March 30, 1995, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), ordered the revocation of the following Customs broker licenses due to the failure of the broker to file the status report as required by 19 CFR 111.30(d). These licenses were issued in the Los Angeles District. The list of affected brokers is as follows:

| <i>Customs broker</i> | <i>License No.</i> |
|------------------------------|--------------------|
| Gilbert E. Amador | 03970 |
| Stanley K. Appel | 06305 |
| Carol J. Boldt-Miller | 06617 |
| Elayne C. Brenner | 11744 |
| Marshall R. Brownfield | 05207 |
| Yolanda Curry | 07856 |
| P.R. Domey | 02998 |
| David W. Doran | 11777 |
| Ferdinand M. Dreifuss | 04236 |
| Herbert S. Fischer | 04484 |
| Charlene Marie Fluster | 11742 |
| James Thomas Gibbs | 12819 |
| Peggy Changsoon Kim | 13616 |
| Young Mok Kim | 05804 |
| Josefina G. Klink | 06673 |
| Suzanne Knight | 11170 |
| Regis Francis Kramer | 03279 |
| Michael O. Larson | 05567 |
| James W. McDonald | 04563 |
| Kay J. Meggison | 05847 |
| Maria D. Oria | 03319 |
| Hal Dennis Pope | 10598 |
| Klaus Roessel | 04052 |
| David C. Salazar | 11457 |
| Morris H. Schneider | 03588 |
| Jack Neal Schulman | 07871 |

Dated: June 14, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, June 20, 1995 (60 FR 32209)]



U.S. Customs Service

General Notices

IMPLEMENTATION OF AUTOMATED EXPORT SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Implementation of Phase I of the Automated Export System (AES).

SUMMARY: This notice announces that beginning on July 3, 1995, the U.S. Customs Service with the assistance of the Bureau of the Census will implement the first phase of AES and also announces to the public where the AES system will be implemented.

BACKGROUND: AES will ultimately provide a single electronic gateway at Customs through which the exporting community can report and receive all information required by U.S. government agencies involved with export administration. AES will create a "one-stop" environment for the trade community to file export information. It will substantially reduce paperwork and eliminate duplicate reporting requirements resulting in decreased respondent burden. AES will facilitate export trade, and improve customer service, trade statistics, and outbound enforcement.

Phase I of AES is for vessel shipments only and only for voluntary participants. Additional implementation phases of AES will be announced in future notices.

Phase I of AES will be implemented in the ports of Baltimore, Maryland; Norfolk, Virginia; Charleston, South Carolina; Houston, Texas (including Galveston and Texas City); and Los Angeles-Long Beach, California.

SECTORS AFFECTED: Parties that may volunteer to participate in Phase I of AES include; exporters, freight forwarders, carriers, custom-house brokers, port authorities, and service bureaus.

RESPONSIBILITIES OF PARTICIPANTS: Exporters, or their agents, will be responsible for providing primary commodity related data, while carriers will be responsible for providing primary transportation related data. These two segments of AES data, commodity and transportation, provide the details needed to complete the export transaction reporting requirements.

During the initial implementation of Phase I of AES, exporters, or their agents, and carriers will be required to continue to report export information under current regulatory requirements using the Shipper's Export Declaration or the Automated Export Reporting Program in addition to reporting export information to AES. This dual reporting period for AES participants is not expected to last past December 31, 1995. The length of the dual reporting period may be adjusted pending the outcome of the evaluation of Phase I of AES. The dual reporting requirement only applies to the export activities of the voluntary participants within the above specified ports. Following this dual reporting period, AES will be extended to other vessel ports to be announced.

DATA CONTROLS: Certain data contained in AES will fall under the purview of the Freedom of Information Act as well as the Privacy Act.

CONTACTS: For information regarding AES, please contact the AES Development Team at (202) 927-0280 or your local Customs Client Representative. To obtain reference or background material, please call the AES MarketFax at (202) 927-3555, extension 100-main menu. To obtain information about AES from a specified port location, please call the following listed phone numbers:

| | |
|--------------------------------------|----------------|
| Baltimore | (410) 962-4483 |
| Norfolk | (804) 543-2033 |
| Charleston | (803) 881-4312 |
| Houston (via Galveston Office) | (409) 766-3624 |
| Los Angeles-Long Beach | (310) 514-6015 |

Dated: June 13, 1995.

RAY MACKIN,
(for Sharon A. Mazur, Director,
AES Development Team.)

[Published in the Federal Register, June 19, 1995 (60 FR 32040)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 14, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,
(for Harvey B. Fox, Director,
Office of Regulations and Rulings.)

**MODIFICATION OF RULING LETTER RELATING TO
TARIFF CLASSIFICATION OF A WALL HANGING/QUILT**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a wall hanging/quilt. Notice of the proposed modification was published May 3, 1995 in the CUSTOMS BULLETIN, Volume 29, Number 18.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after August 28, 1995.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Classification Branch (202) 482-7048

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 3, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 18, proposing to modify Headquarters Ruling Letter (HRL) 084034, dated, April 24, 1989, which classified a wall hanging/quilt in subheading 9404.90.9010 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for articles of bedding and similar furnishings. Upon further examination of the subject article, it is Customs belief that it is not an article of bedding or a similar furnishing. Due to the irregular sizing of the article, it is incapable of adequately covering a standard size mattress, so that use as bed linen is impractical. Therefore, the subject article is properly classifiable in subheading 6304.92.0000, HTSUSA, which provides for other furnishings, excluding those of heading 9404.

Two comments were received in response to this notice. Both comments agree with our proposal to modify HRL 084034 to reflect the proper classification of a wall hanging/quilt in subheading 6304.92.0000, HTSUSA, rather than subheading 9404.90.9010, HTSUSA. However, the comments request that in the proposed modification letter identified as the Attachment to this document, Customs establish guidelines for determining what is, and is not, a significant deviation from standard bed linen dimensions. One comment specifically states:

In the event that Customs is reluctant to establish tolerance limits, Peking suggests that, at a minimum, Customs recognize that a deviation of *less* than the standard dimensions is more significant than a deviation of more than the standard dimensions. Many mattress manufacturers are now producing what is marketed as "deep" or "premium" mattresses. These mattresses are thicker than standard mattresses, and bed linen manufacturers have commenced producing merchandise designed to fit such mattresses * * * simply stated, a slight overlap may be acceptable or even desired. However, the inability of a quilt to properly cover a mattress could render it unfit for use as a bed covering.

In response to the comment, we recognize the recent commercial trend for mattress manufacturers to produce "deep" or "premium" mattresses that slightly deviate from standard size mattresses. We also are aware that certain bed linen manufacturers will design bed linen to fit these slightly oversized mattresses. It is our opinion, however, that we have taken into account these limited instances where an article with the general appearance of a quilt deviates from the standard bed linen sizes. In the Attachment, we specifically state, "those goods with the general appearance of bedding which slightly deviate from the standard quilt sizes and could still adequately cover an entire bed so that use as a quilt is reasonable and likely, would also be classifiable under Heading 9404, HTSUSA."

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 084034 to reflect the proper classification of wall hangings in subheading 6304.92.0000, HTSUSA. HRL 957645 modifying HRL 084034 is set forth as an Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 12, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, June 12, 1995.

CLA-2 R:C:T 957645 CAB

Category: Classification

Tariff No. 6304.92.0000

Ms. DOLORES TIONGCO
QUINTESSENTIAL QUILTS
578 Westgate Drive
State College, PA 16803

Re: Modification of HRL 084034, dated April 24, 1989; classification of wall hanging/quilt;
other furnishings; heading 9404; heading 6304.

DEAR Ms. TIONGCO:

This is in reference to Headquarters Ruling Letter (HRL) 084034, dated April 24, 1989, issued to you from Customs. Since the issuance of that ruling, Customs has reexamined your submission as well as the conclusion and determined that the ruling was decided incorrectly. Pursuant to section 625(c)(1), Tariff Act of 1930 (19U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), notice of the proposed modification of HRL 084034 was published on May 3, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 18.

Facts:

The merchandise at issue is referred to as 100 percent cotton quilt. The article, filled with polyester batting, is approximately 52 inches square and has a four inch wide sleeve along the back edge which allows the item to be hung for decorative purposes. The front of the article contains colorful designs which are formed by piecing and the back is constructed of a solid fabric. A folded bias edging that is approximately 8 mm acts as a finish on all four sides.

In HRL 084034 the subject article was classified in subheading 9404.90.9010 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for articles of bedding and similar furnishings. Customs is of the opinion that the subject article is properly classifiable under subheading 6304.92.0000, HTSUSA, which provides for other furnishings, excluding those of heading 9404.

Issue:

Whether the subject article is classifiable under Heading 9404, HTSUSA, or Heading 6304, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

As stated above, the subject articles are potentially classifiable under two distinct headings, Heading 6304, HTSUSA, or Heading 9404, HTSUSA.

Heading 9404, HTSUSA, provides for, mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material, or of cellular rubber or plastics, whether or not covered. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the nomenclature at the international level. The EN to Heading 9404, HTSUSA, state, in pertinent part:

This heading covers:

* * * * *

(B) Articles of bedding and similar furnishing which are sprung or stuffed or internally fitted with any material (cotton, wool, horsehair, down, synthetic fibres, etc.) or are of cellular rubber or plastics

*** For example:

(2) Quilts and bedspreads (including counterpanes, and also quilts for baby-carriages), eiderdowns and duvets (whether of down or any other filling), mattress-protectors (a kind of thin mattress placed between the mattress itself and the mattress support), bolster, pillows, cushions, pouffes, etc.

The Modern Textile and Apparel Dictionary, (1973), defines a quilt as "usually a bed covering of two thicknesses of material with wool, cotton, or down batting in between for warmth." *Webster's II New Riverside University Dictionary*, (1984), defines a quilt as "a bed covering consisting of two layers of fabric with a layer of batting or feathers between and stitched firmly together, usually in a decorative pattern. It defines bedding as "bedclothes, which are coverings, such as sheets and blankets, used on a bed." *Webster's New World Dictionary*, (1988), defines bedding as "mattresses and bedclothes." In order to determine if the subject articles are classifiable under Heading 9404, HTSUSA, Customs must decide whether they are considered bedding for tariff classification purposes.

There is no provision in the nomenclature or the EN which specifies that articles classifiable under Heading 9404, HTSUSA, must be able to cover a bed. However, it is Customs opinion, that implicit in an article being considered "bedding" is that it be capable of serving a primary function of covering a bed sufficiently so as to make such use practicable.

After conferring with numerous mattress and bed linen manufacturers in the United States, Customs has determined that there are standard commercial sizes for mattresses and bed coverings. The standard sizes are as follows:

| Mattress sizes | Quilts and bedspreads |
|-----------------|-----------------------|
| Twin 39" x 75" | 66" x 86" |
| Full 54" x 75" | 81" x 86" |
| Queen 60" x 80" | 86" x 86" |
| King 78" x 80" | 100" x 90" |

Customs checked with various manufacturers of crib mattresses and received various dimensions for crib mattresses. The differing dimensions are as follows:

| Mattress sizes |
|----------------|
| Crib 27" x 51" |
| 27" x 51½" |
| 27" x 54" |
| 28" x 52" |
| 27½" x 52" |

Depending on the particular bedding manufacturer, the dimensions of crib quilts varied greatly.

The preceding discussion leads us to the question of whether the subject article is a quilt for tariff classification purposes. The article is comprised of two layers of material with a layer of polyester batting stitched in between the two layers of material. It also contains a sleeve that would allow it to be hung on the wall for adornment. The sleeve is a consideration in the tariff classification process, nevertheless, Customs views it as a convenience to the purchaser and not determinative of the classification. The instant article meets the definition for quilts provided in the lexicographic sources.

The dimensions of the subject article are 52"x52". After viewing, these dimensions in light of the standard size mattresses and bedding listed, it is clear to Customs that the subject article would not sufficiently cover any of the standard size mattresses. Either the subject article would be too small to adequately cover the twin, full, queen, or king size mattresses or too large for the crib size mattresses. As the subject article deviates significantly from the stated standard sizes for quilts and therefore, would be incapable of adequately covering a bed, Customs is of the opinion it is not a quilt for tariff classification purposes.

It is important to note that except for the irregular dimensions, the subject article has the general appearance and construction of a quilt. Therefore, if the article were to meet the standard measurements for the crib, twin, full, queen, or king size quilts as recognized in domestic industry, it would be classified under Heading 9404, HTSUSA. Customs is aware that in certain limited instances, goods will be imported as quilts and vary slightly from the standard quilt sizes. Thus, Customs is reluctant to provide specific dimensions and a dividing line for goods that are potentially classifiable as quilts or bedding. Consequently, those goods with the general appearance of bedding which slightly deviate from

the standard quilt sizes and could still adequately cover an entire bed so that use as a quilt is reasonable and likely, would also be classifiable under Heading 9404, HTSUSA.

Heading 6304, HTSUSA, provides for other textile furnishing articles, excluding those of Heading 9404. The EN to Heading 6304, HTSUSA, state, in pertinent part:

* * * * *

These articles include wall hangings and textile furnishings for ceremonies (e.g., weddings or funerals); mosquito nets; bedspreads (but **not including** bed coverings of **heading 94.04**); cushion covers, loose covers for furniture, * * *.

In Headquarters Ruling Letter (HRL) 087551, dated November 9, 1990, Customs confronted the issue of the proper tariff classification of an article described therein as a "bed throw". The article measured 46 inches by 60 inches and had fringe on all four sides. Customs determination was, as follows:

Both the sample articles (46 x 60) and the imported article (54 x 60) are too small to cover a bed; moreover, bed throws commonly have fringe on only three sides. Thus, Customs does not consider the instant article to be a bed throw but instead, views it as similar to a furniture throw or cover. In either case, however, the article is classifiable as a furnishing of heading 6304.

Recently, in HRL 957410, dated February 3, 1995, Customs determined that quilted articles which measured 50 x 60 inches and contained rod pockets to enable them to be hung on the wall for decorative purposes were classifiable as other furnishings under Heading 6304, HTSUSA.

In HRL 084034, Customs stated the following:

[I]n general a quilt is a bedcover consisting of three layers, one of which is a filling, all held together by stitching or tufts through all thicknesses. The submitted sample stated to be a quilt, conforms to this definition and, by virtue of its filling, meets the requirements of the tariff provision that it be "internally fitted with any material."

The aforementioned statement is correct, however, what Customs did not consider before determining that the article was a quilt for tariff classification purposes was that it be capable of covering a bed so that use as a quilt was practicable. The article at issue measures 52 inches square. The measurements significantly deviate from standard quilts and bedspread sizes. The article is incapable of covering any standard size mattress. As a result of this deviation, Customs does not believe that classification as a quilt is correct. Consequently, the instant article is classifiable as other furnishing articles under Heading 6304, HTSUSA.

Holding:

Based on the foregoing, the subject article is classifiable in subheading 6304.92.0000, HTSUSA, which provides for other furnishing articles, excluding those of heading 9404, not knitted or crocheted, of cotton. The applicable rate of duty is 7.1 percent *ad valorem* and the textile restraint category is 369.

HRL 084034 of April 24, 1989, is hereby modified. In accordance with section 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulation (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF A METALLIC BRAIDED CORD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a metallic braided cord. Notice of the proposed modification was published May 3, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after August 28, 1995.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202-482-7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 3, 1995, Customs published a notice in the CUSTOMS BULLETIN, volume 29, Number 18, proposing to modify New York Ruling Letter (NYRL) 883073 of April 5, 1993. That ruling classified a metallic braided cord as a braid in the piece, other, of man-made fiber, in subheading 5808.10.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The classification decision was based upon Note 2(A), Section XI, HTSUSA, directing classification by chief weight. Customs determined this was an error. Subheading Note 2 was the applicable note and it requires utilization of General Rule of Interpretation 3 to determine classification. No comments were received in response to our notice of intent to modify NYRL 883073.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL 883073 to reflect the proper classification of the metallic braided cord based upon application of subheading note 2, Section XI, HTSUSA. Headquarters Ruling Letter 957751 modifying NYRL 883073 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 6, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC, June 6, 1995.

CLA-2 R:C:T 957751 CMR

Category: Classification

Tariff No. 5808.10.9000

Ms. BARBARA HO
720 Iwilei Road, Ewa Wing 280
Honolulu, HI 96817

Re: Modification of New York Ruling Letter (NYRL) 883073; classification of a braided metallic yarn; essential character.

DEAR Ms. HO:

On April 5, 1993, Customs issued NYRL 883073 to you regarding the classification of various decorative cords from China. We have reviewed that ruling and found we erred in the classification of one of the cords at issue therein. The item is described below.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of (NYRL) 883073 was published May 3, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 18.

Facts:

The cord at issue was described in NYRL 883073 as a 5/32-inch diameter silver cord consisting of a braided core of polyester with an outer covering of tubular braided metallic yarn. The Customs laboratory in New York reported the composition of the cord as: 73.9 percent braided core polyester, 22.4 percent metallic yarn, and 3.7 percent braided core collar.

The yarn was classified in subheading 5803.10.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as a braid in the piece, other, of man-made fibers. This classification was based on the chief weight of the cord.

Issue:

What is the proper classification of the cord at issue and on what basis is the determination made?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order]."

Note 2(A), Section XI, provides, in relevant part:

Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.

* * * * *

Subheading Note 2, Section XI, provides, in part:

(A) Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 consisting of the same textile materials.

(B) For the application of this rule:

(a) Where appropriate, only the part which determines the classification under general interpretative rule 3 shall be taken into account;

* * * * *

The braid at issue was properly classified in heading 5808, HTSUSA, as a braid in the piece. Therefore, Subheading Note 2 is the applicable provision. This provision requires the classification be determined using GRI 3. Thus, it is not a matter of classifying based on

the component in chief weight. Customs erred in NYRL 883073 by using chief weight in deciding the proper classification of the cord.

The subject braided cord consists of an exterior metallic braid with a braided man-made fiber core. As such, it is a composite good. GRI 3(b) directs that for a composite good consisting of different materials, which cannot be classified by reference to GRI 3(a), classification shall be according to the component that imparts the essential character of the good. In this case, we believe the metallic braid outer covering imparts the essential character of the good.

Holding:

The subject metallic braided cord is classified in subheading 5808.10.9000, HTSUSA, which provides for braids in the piece, other than braids in the piece suitable for making or ornamenting headwear, other than of cotton or man-made fibers, dutiable at 8 percent *ad valorem*. At the time NYRL 883073 was issued, the proper classification was subheading 5808.10.3090, HTSUSA, which was the predecessor to subheading 5808.10.9000, HTSUSA.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF PICNIC BASKETS AND CASES MADE OF PLAINTING MATERIALS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to modify five ruling letters pertaining to the tariff classification of picnic baskets and cases made of plaiting materials. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before July 28, 1995.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Office of Regulations and Rulings, Textile Classification Branch (202-482-7014).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to modify five ruling letters pertaining to the classification of picnic baskets and cases made of plaiting materials. Comments are invited on the correctness of the proposed ruling.

In the following ruling letters, Customs classified picnic baskets and picnic cases made of plaiting materials as luggage of plaiting materials under subheading 4602.10, Harmonized Tariff Schedule of the United States Annotated (HTSUSA): Headquarters Ruling Letter (*HRL) 954702, dated August 16, 1994; HRL 951181, dated March 30, 1993; New York Ruling Letter (NYRL) 894451, dated February 18, 1994; NYRL 894011, dated January 28, 1994; and NYRL 866788, dated September 24, 1991. These rulings are set forth, respectively, as Attachments "A" through "E" to this document.

It is Customs position that the nature and character of the picnic baskets and cases do not support their classification at the subheading level as "luggage." Instead, they are of a class or kind of article principally used as "picnic baskets." Consequently, they should be classified at the subheading level as "other baskets." The following proposed rulings revoking, respectively, the rulings set forth as Attachments "A" through "E," as above, are set forth as Attachments "F" through "J" to this document: 957997; 957998; 957996; 957999; and 957995.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 8, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.

U.S. CUSTOMS SERVICE,

Washington, DC, August 16, 1994.

CLA-2 CO:R:C:T 954702 HP

Category: Classification

Tariff No. 4602.10.2500

MR. KEN MELLONI

JENIGERE

P.O. Box 1256

Linwood, PA 19061

Re: DD 887262 affirmed. Picnic basket is luggage, not basketware.

DEAR MR. MELLONI:

This is in reply to your letter of July 23, 1993. That letter concerned the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of picnic baskets, produced in Indonesia.

Facts:

The merchandise at issue consists of an unlined rattan picnic basket with two dividers, model #W-00158-0. It measures approximately 21" x 12" x 11.5" BH x 6" HH and has a single rattan handle. The slotted lid is designed to fit over the handle.

In DD 887262 of June 23, 1993, the District Director, Providence, Rhode Island, classified this basket under subheading 4602.10.2500, HTSUSA, as luggage, handbags and flatgoods of rattan. You disagree, arguing that the proper classification should be under 4602.10.1300, HTSUSA, as other baskets.

Issue:

Whether the picnic basket is considered luggage or baskets under the HTSUSA?

Law and Analysis:

Heading 4602, HTSUSA, provides for basketwork and other articles of plaiting materials. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System (Harmonized System) constitute the official interpretation of the scope and content of the tariff at the international level. They represent the considered views of classification experts of the Harmonized System Committee. *Totes, Inc. v. United States*, No. 91-09-00714, slip op. 92-153, 14 Int'l Trade Rep. (BNA) 1916, 1992 Ct. Intl. Trade LEXIS 158 (Ct. Int'l Trade 1992). While not treated as dispositive, the EN are to be given considerable weight in Customs' interpretation of the HTSUSA. *Boast, Inc. v. United States*, 15 Int'l Trade Rep. (BNA) 1188, 1993 Ct. Intl. Trade LEXIS 19 (Ct. Int'l Trade 1993). It has therefore been the practice of the Customs Service to follow, whenever possible, the terms of the Explanatory Notes when interpreting the HTSUSA. The EN to this heading states that such articles include:

(1) Baskets, panniers, hampers and basketware containers of all kinds, whether or not fitted with rollers or castors, including fish baskets, creels and fruit baskets.

* * * * *

(3) Travelling-bags and suitcases.

(4) Handbags, shopping-bags and the like.

Heading 4602 does not distinguish between various types of articles of vegetable plaiting materials. The Explanatory Notes therefore cannot aid us in this matter.

Heading 4602 requires classification of baskets separately from "luggage, handbags and flatgoods" at the 8-digit level. By specifically listing luggage, handbags and the like separately from baskets, Congress demonstrated its intent to have articles used for the conveyance of items (which the picnic "basket" clearly is) classified apart from household containers constructed of plaiting materials. In addition, under the previous tariff schedule, we classified picnic baskets under the provision for luggage. Since the two competing subheadings are at the U.S. level in the HTSUSA, examination of prior classification practices is appropriate. Finally, we note that the basket in question is typical of those designed to carry items such as table linen and utensils, as well as food and beverages. Accordingly, classification of this merchandise as luggage was correct.

Holding:

As a result of the foregoing, the instant merchandise is classified under subheading 4602.10.2500, HTSUSA, as other rattan luggage, handbags and flatgoods. The applicable rate of duty is 18 percent *ad valorem*. DD 887262 is affirmed.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 30, 1993.

CLA-2 CO:R:C:T 951181 HP
Category: Classification
Tariff No. 4602.10.2100

MS. JEAN F. MAGUIRE
AREA DIRECTOR
U.S. CUSTOMS SERVICE
Suite 716
6 World Trade Center
New York, NY 10048-0945

Re: Application for Further Review of Protest 1001-90-005449. Picnic basket sets with dinnerware. Bamboo; fern.

DEAR MS. MAGUIRE:

This is in reply to Memorandum PRO-2-05-O:C:R JAD, dated February 20, 1992, from the Head, Protest and Control Section, New York Region, transmitting photocopies and samples pertaining to Application for Further Review of Protest 1001-90-005449. Mr. DiSalvo has requested you forward to him a copy of this document.

Facts:

The merchandise at issue consists of two picnic baskets with plastic dinner sets, style numbers 17-6125 and 17-6126. Protestant has submitted samples of the materials from which it states the baskets have been manufactured. The protestant is of the opinion that the merchandise should be classified either as baskets of a material other than bamboo, or, in the alternative, as luggage of a material other than bamboo. Customs classified this merchandise upon entry as bamboo luggage.

Although samples of the entire picnic baskets were not submitted with the protest, the National Import Specialist has informed us that a sample was examined at liquidation. The basket was cube shaped and had a hinged lid with a handle system which served to secure the top and permit the basket to be carried. Although the protestant submitted a "Vendor Certificate" stating that 83% by weight of the baskets was fern and 17% was bamboo, Customs Laboratory Report No. 2-90-30612-001 found that the "vegetable fibrous material" of which the baskets are constructed are "more than 60% bamboo and less than 40% fern."

Issue:

Whether the picnic basket sets are classifiable as baskets or luggage under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)? Whether the essential character of the baskets sets is imparted by the bamboo or by the fern?

Law and Analysis:

It is undisputed that since the "basket" portion of the picnic set imparts its essential character, classification of the set as a whole relies not only upon whether the "basket" is

considered luggage under the HTSUSA, but also on the composition of the "basket". As we stated above, although the importer claimed that the baskets were constructed of mostly fern, Customs Laboratory tests upon samples of the merchandise as entered indicated otherwise. In addition to the baskets' composition, the Import Specialist's information report includes a statement that the "visual impact" of the bamboo portion left "little or no doubt" that the bamboo gave the baskets their essential character. The picnic sets, therefore, are classifiable as "of bamboo".

As an alternative to classification as luggage of plaiting materials, protestant has suggested classification as basketwork. We disagree. By specifically listing luggage, handbags and the like separately from baskets, Congress demonstrated its intent to have articles used for the conveyance of items (which the picnic "basket" clearly is) classified apart from mere household containers constructed of plaiting materials. Accordingly, classification of this merchandise as luggage was correct.

Holding:

As a result of the foregoing, the instant merchandise is classified under subheading 4602.10.2100, HTSUSA. The applicable rate of duty is 12.5 percent *ad valorem*. The Protest should be Denied in Full. A copy of this letter should be forwarded to protestant as part of the Notice of Action.

HUBBARD VOLENICK
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, February 18, 1994.

CLA-2-42:SN:N6:341 894451
Category: Classification
Tariff No. 4602.10.2940

NANTUCKET DISTRIBUTING
261 White's Path
South Yarmouth, MA 02664

Re: The tariff classification of a picnic basket from China.

DEAR MS. NEARY:

In your letter dated January 19, 1994, you requested a tariff classification ruling for a picnic basket. The item submitted is a picnic basket which is unlined, has double wood handles and a plywood hinged lid. The body is wholly woven of chipwood strips each having an approximate thickness of 5.5 mm. The item is unlined and measures approximately 12 1/2 inches in width by 8 1/2 inches in depth.

The applicable subheading for the picnic basket of woven chipwood strips will be 4602.10.2940, Harmonized Tariff Schedule of the United States (HTS), which provides for basketwork, wickerwork and other articles, made directly to shape from plaiting materials or made up from articles or heading 4601; luggage, handbags and flatgoods, whether or not lined, other, other. The duty rate will be 5.3 percent *ad valorem*. This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to [*2] the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, January 28, 1994.

CLA-2-42:S:N:N6:341 894011
Category: Classification
Tariff No. 4602.10.2500

CONTINENTAL SHELF CO.
631 Lupine Valley Rd.
Aptos, CA 95003

Re: The tariff classification of picnic baskets from Mexico.

DEAR MR. VORIS:

In your letter dated January 12, 1994, you requested a tariff classification ruling for picnic baskets. You have submitted photos and drawings of two items identified as picnic baskets said to be composed of rattan and/or palm. You have indicated that there will be no mixing of the two materials. The items appear to be designed with hinged lids, handles over the top style, and self material clasp closure mechanisms.

The applicable subheading for the picnic baskets of rattan and/or palm will be 4602.10.2500, Harmonized Tariff Schedule of the United States (HTS), which provides for luggage, handbags and flatgoods, whether or not lined, of rattan or of palm leaf, other. The duty rate will be 18 percent *ad valorem*. This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed [2*] without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, September 24, 1991.

CLA-2-46:S:N:N3G:341 866788
Category: Classification
Tariff No. 4602.10.2200

MS. JULIA E. HARTENFELS
WILLIAM B. SKINNER, INC.
HEMISPHERE CENTER
Routes 1 and 9 South
Newark, NJ 07114

Re: The tariff classification of a picnic basket from China.

DEAR MS. HARTENFELS:

In your letter dated September 5, 1991, on behalf of Taching Import Export Co., Inc., you requested a tariff classification ruling.

The submitted sample, item #W098, is a picnic basket constructed of 100% willow with a removable textile man-made lining for easy cleaning. Although the lining is removable, it is specially made for the basket and will be sold at retail with the basket. The item is oval in design, and features a willow carrying handle across the top center of the basket with lift-up flaps on both sides of the handle for easy storage and/or removal of picnic items.

The applicable subheading for item #W098, the picnic basket of 100% willow, will be 4602.10.2200, Harmonized Tariff Schedule of the United States (HTS), which provides for

luggage, handbags and flatgoods whether or not lined, of willow. The duty rate will be 5.8 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:T 957997 BC
Category: Classification
Tariff No. 4602.10.1600

KEN MELLONI
JENIGERE
P.O. Box 1256
Linwood, PA 19061

Re: Reconsideration of HRL 954702; classification of a picnic basket made of plaiting materials; baskets; luggage

DEAR MR. MELLONI:

Recently, Customs has had occasion to review the matter of classification of picnic baskets and cases made of plaiting materials. We have determined that baskets and cases of the class or kind principally used as picnic baskets are classifiable as "other baskets," rather than as "luggage," under subheading 4602.10, HTSUSA. Consequently, we hereinbelow modify Headquarters Ruling Letter (HRL) 954702, issued to you on August 16, 1994, on behalf of Jenigere.

Facts:

On August 16, 1994, Customs issued HRL 954702, which classified a rattan picnic basket in subheading 4602.10.2500, which provides for luggage of vegetable plaiting materials, of rattan. The ruling affirmed District Ruling (DD) 887262, issued by the District Director of Customs, Providence, Rhode Island, on June 23, 1993. The Headquarters ruling described the picnic basket as follows: "The merchandise at issue consists of an unlined rattan picnic basket with two dividers, model #W-00158-0. It measures approximately 21" x 12" x 11.5" BH x 6" HH and has a single rattan handle. The slotted lid is designed to fit over the handle."

Issue:

Whether the picnic basket at issue is classifiable as "other baskets" or "luggage" under subheading 4602.10, HTSUSA?

Law and Analysis:

For purposes of this discussion, we note that heading 4602, which provides for basketwork, wickerwork, and other articles made directly to shape from plaiting materials, is divided into two major parts: (I) of vegetable materials (4602.10) and (II) other (4602.90). The relevant first part (4602.10) is divided into four subparts: (1) fishing baskets and creels (4602.10.05); (2) other baskets and bags, whether or not lined (4602.10.07-4602.10.18); (3) luggage, handbags and flatgoods (4602.10.21-4602.10.29); and (4) other (4602.10.35-4602.10.80).

In HRL 954702, we correctly pointed out that the structure of heading 4602, HTSUSA, requires that baskets be classified separately from luggage, handbags, and flatgoods. However, in concluding that the picnic basket at issue was correctly classified as luggage (of plaiting materials) in DD 887262, we stated the following: "By specifically listing luggage,

handbags and the like separately from baskets, Congress demonstrated its intent to have articles used for the conveyance of items (which the picnic 'basket' clearly is) classified apart from mere household containers constructed of plaiting materials." This statement implies that, for purposes of classification in heading 4602, HTSUSA, luggage is defined as articles used for the conveyance of items, and baskets are defined as household containers constructed of plaiting materials. We now believe that this definition of "luggage" is too broad, encompassing many articles that are not luggage, and this definition of "baskets" is too narrow, appearing to limit baskets to household containers that do not convey items. The result is a blurring of the heading's separation of baskets from luggage.

The definitions put forward in HRL 954702 permitted classification of the picnic basket as luggage. A picnic basket or case, being used outside the home, is not a household article, so it could not be classified as a basket. Also, since a picnic basket/case is an article that conveys items, it fit the broad definition of luggage. Yet, a close examination of the picnic basket at issue in HRL 954702 (as well as picnic baskets/cases generally) reveals that its nature and character are more like those of baskets than of luggage. It is made of materials characteristic of picnic and other baskets. It is designed and used for carrying food, beverages, and utensils to picnics and picnic-like events (such as a day at the beach or outdoor concert). (Some baskets/cases of the general kind at issue contain lining and/or interior compartments or fittings for holding plastic dinnerware.) It is called a picnic basket. It is marketed as a picnic basket. In short, everything about this picnic basket suggests "basket." Moreover, its construction is not sufficiently durable or flexible for use as luggage.

In *Royal Cathay Trading Co. v. United States*, 45 Cust. Ct. 99, C.D. 2206 (1960), a case where the United States Customs Court rejected Customs classification of suitcases and valises made of or plaiting materials as baskets under the Tariff Schedules of the United States (TSUS), the court based its decision on the character of the articles there at issue. The court reasoned that while the suitcases and valises fit the broad definition of "baskets" put forward in *United States v. Byrnes & Co.*, 11 Ct. Cust. Appls. 68, T.D. 38728, the obvious character of these articles precluded their classification as such. The court looked to the nature and use of the articles to determine their character, and concluded that their character was not that of baskets, but was instead that of suitcases and valises.

Applying the rationale of the *Royal Cathay* opinion to the instant case, and to the matter of picnic baskets and cases generally, we believe that the character of these articles is more like that of baskets and less like that of luggage. Their nature and use establish their character as picnic baskets, and picnic baskets are not luggage. (See *H.J. Stotter, Inc. v. United States*, Court No. 92-03-00142, Slip op. 94-121, July 27, 1994 (CIT), 28 Cust. Bull., No. 33, p. 48, 52, quoting from *United States v. Quon Quon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959), for the proposition that evidence of use is often highly probative of an article's identity for tariff purposes.)

It is necessary then to set forth an interpretation of heading 4602, HTSUSA, that better distinguishes between baskets and luggage. Thus, we conclude that the "other baskets" subheadings of subheading 4602.10, HTSUSA, provide for all baskets, other than fishing baskets and creels, whether or not they are household articles and whether or not they are used to carry other articles. The "luggage, handbags, and flatgoods" subheading is limited to coverage the named articles (subject to the *ejusdem generis* rule of statutory construction). We decline to broadly define luggage for purposes of heading 4602, HTSUSA, as containers used to carry other articles from place to place. To do so is to improperly encompass a wide variety of containers that do not remotely resemble luggage.

Based on the foregoing, we conclude that the picnic basket at issue is classifiable as an "other basket" of vegetable plaiting materials. The precise subheading applicable to the basket depends on its material composition. As stated in the "FACTS" section, the picnic basket is made of rattan.

Holding:

The rattan picnic basket at issue, classified in HRL 954702 as luggage of vegetable plaiting materials, is instead classifiable in subheading 4602.10.1600, HTSUSA, as an other basket of vegetable plaiting materials, of rattan, other. The applicable duty rate is 7% *ad valorem*.

Accordingly, HRL 954702 is hereby modified, and District ruling 887262 is hereby superceded.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:T 957998 BC
Category: Classification
Tariff No. 4602.10.0900

WILLIAM ASTA
HIMARK ENTERPRISES
155 Commerce Drive
Hauppauge, NY 11787

Re: Reconsideration of HRL 951181; classification of picnic cases made of plaiting materials; picnic baskets; picnic sets; GRI 3(b).

DEAR MR. ASTA:

Recently, Customs has had occasion to review the matter of classification of picnic baskets and cases made of plaiting materials. We have determined that baskets/cases of the class or kind principally used as "picnic baskets" are classifiable as "other baskets," rather than as "luggage," under subheading 4602.10, HTSUSA. Consequently, we hereinbelow modify Headquarters Ruling Letter (HRL) 951181, issued on March 30, 1993, as a decision on a protest filed by you on behalf of Himark Enterprises.

Facts:

On March 30, 1993, we issued HRL 951181, a protest decision pertaining to two picnic sets, identified as style numbers 17-6125 and 17-6126, consisting of picnic cases made of plaiting materials and plastic dinnerware. The picnic sets were classified as sets under General Rule of Interpretation (GRI) 3(b), with the picnic cases imparting essential character to the sets. Thus, the picnic sets were classified according to the tariff provision applicable to the cases.

In classifying the cases, the ruling noted that one of the cases was examined at the time of liquidation. The ruling described it as follows: "[It was] cube shaped and had a hinged lid with a handle system which served to secure the top and permit the basket to be carried." The ruling also noted that the cases consisted of more than 60% by weight of bamboo and less than 40% by weight of fern. In addition, at liquidation, for purposes of determining the composition of the cases for subheading level classification under GRI 3(b) (through GRI 6), Customs determined that the bamboo component of the plaiting materials imparted essential character to the cases. The ruling classified the cases, and thus the picnic sets, in subheading 4602.10.2100, HTSUSA, as luggage of vegetable plaiting materials, of bamboo.

Issue:

Whether the picnic cases at issue are classifiable as "other baskets" or as "luggage" under subheading 4602.10, HTSUSA?

Law and Analysis:

For purposes of this discussion, we note that heading 4602, which provides for basket-work, wickerwork, and other articles made directly to shape from plaiting materials, is divided into two major parts: (I) of vegetable materials (4602.10) and (II) other (4602.90). The relevant first part (4602.10) is divided into four subparts: (1) fishing baskets and creels (4602.10.05); (2) other baskets and bags, whether or not lined (4602.10.07-4602.10.18); (3) luggage, handbags and flatgoods (4602.10.21-4602.10.29); and (4) other (4602.10.35-4602.10.80).

In HRL 951181, in concluding that the picnic cases were correctly classified as luggage (of plaiting materials), we stated the following: "By specifically listing luggage, handbags and the like separately from baskets, Congress demonstrated its intent to have articles used for the conveyance of items (which the picnic 'basket' clearly is) classified apart from mere household containers constructed of plaiting materials." This statement implies that, for purposes of classification in heading 4602, HTSUSA, luggage is defined as *articles used for the conveyance of items*, and baskets are defined as *household containers constructed of plaiting materials*. We now believe that this definition of "luggage" is too

broad, encompassing many articles that are not luggage, and this definition of "baskets" is too narrow, appearing to limit baskets to household containers that do not convey items. The result is a blurring of the heading's structural separation of baskets from luggage.

The definitions put forward in HRL 951181 permitted classification of the picnic cases as luggage. Picnic cases, being used outside the home, are not household articles, so they could not be classified as baskets. Also, since the cases are articles that convey items, they meet the broad definition of luggage. Yet, a close examination of the cases at issue reveals that their nature and character are more like those of picnic baskets than of luggage. They are made of materials characteristic of picnic and other baskets. They are designed and used for carrying food, beverages, and utensils to picnics and picnic-like events (such as a day at the beach or outdoor concert). They are called picnic baskets. They are marketed as picnic baskets. The linings and plastic dinnerware distinguish these containers as picnic baskets. (Some picnic cases of the general kind at issue exhibit compartments or internal fixtures for securing the dinnerware.) In short, everything about these picnic cases suggests "baskets." Moreover, their construction is not sufficiently durable or flexible for use as luggage.

In *Royal Cathay Trading Co. v. United States*, 45 Cust. Ct. 99, C.D. 2206 (1960), a case where the United States Customs court rejected Customs classification of suitcases and valises made of plaiting materials as baskets under the Tariff Schedules of the United States (TSUS), the court based its decision on the character of the articles there at issue. The court reasoned that while the suitcases and valises fit the broad definition of "baskets" put forward in *United States v. Byrnes & Co.*, 11 Ct. Cust. Appls. 68, T.D. 38728, the obvious character of these articles precluded their classification as such. (The court also stated that the *Byrnes* definition of "baskets" was not intended to apply in all cases.) The court looked to the nature and use of the articles to determine their character, and concluded that their character was not that of baskets, but was instead that of suitcases and valises.

Applying the rationale of the *Royal Cathay* opinion to the instant case, and to the matter of picnic baskets and cases generally (of plaiting materials), we believe that the character of these articles is more like that of baskets and less like that of luggage. Their nature and use establish their character as picnic baskets, and picnic baskets are not luggage. (See *H.J. Stotter, Inc. v. United States*, Court No. 92-03-00142, Slip op. 94-121, July 27, 1994 (CIT), 28 Cust. Bull., No. 33, p. 48, 52, quoting from *United States v. Quon Quon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959), for the proposition that evidence of use is often highly probative of an article's identity for tariff purposes.)

It is necessary then to set forth an interpretation of heading 4602, HTSUSA, that better distinguishes between baskets and luggage. Thus, we conclude that the "other baskets" subheadings of subheading 4602.10, HTSUSA, provide for all baskets, other than fishing baskets and creels, whether or not they are household articles and whether or not they are used to carry other articles. The "luggage, handbags, and flatgoods" subheading is limited to coverage of the named articles (subject to the *ejusdem generis* rule of statutory construction). We decline to broadly define luggage for purposes of heading 4602, HTSUSA, as containers used to carry other articles from place to place. To do so is to improperly encompass a wide variety of containers that do not remotely resemble luggage.

Based on the foregoing, we conclude that the picnic cases at issue are classifiable as other baskets of plaiting materials. The precise subheading applicable to the cases depends on their material composition. As stated in the "FACTS" section, HRL 851181 concluded that the cases at issue consisted of more than 60% by weight of bamboo. In addition, the Customs official handling the liquidation of the entries covered by this protest concluded that the bamboo material imparted essential character to the baskets (for purposes of subheading level classification). In view of the comparatively high percentage of bamboo present in the cases (more than 60% compared to less than 40% fern), plus the fact that we do not have a sample of the merchandise to examine, we will not disturb the latter conclusion. Therefore, the cases at issue should be classified as if consisting of bamboo.

Holding:

The picnic sets at issue, consisting of picnic cases made of plaiting materials with plastic dinnerware, are classifiable as sets under GRI 3(b), according to the tariff provision applicable to the cases. The picnic cases are made of plaiting materials, with a composition of more than 60% by weight of bamboo. Thus, the picnic cases, classified as luggage of vegetable plaiting materials in HRL 951181, are classifiable as other baskets of vegetable plaiting

materials, of bamboo, in subheading 4602.10.0900, HTSUSA. The applicable duty rate is 10% *ad valorem*.

Accordingly, HRL 951181 is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:T 957996 BC
Category: Classification
Tariff No. 4602.10.1800

NANTUCKET DISTRIBUTING
261 White's Path
South Yarmouth, MA 02664

Re: Reconsideration of NYRL 894451; classification of a picnic basket made of plaiting materials; other baskets; luggage.

DEAR MS. NEARY:

Recently, Customs has had occasion to review the matter of classification of picnic baskets and cases made of plaiting materials. We have determined that baskets and cases of the class or kind principally used as picnic baskets are classifiable as "other baskets," rather than as "luggage," under subheading 4602.10, HTSUSA. Consequently, we hereinbelow modify New York Ruling Letter (NYRL) 894451, issued to you on February 18, 1994.

Facts:

On February 18, 1994, Customs issued NYRL 894451, classifying a picnic basket in subheading 4602.10.2940, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for luggage of vegetable plaiting materials, other, other. The ruling described the basket as follows: "The item submitted is a picnic basket which is unlined, has double wood handles and a plywood hinged lid. The body is wholly woven of chipwood strips each having an approximate thickness of 5.5 mm. The item * * * measures approximately 12 1/2 inches in width by 8 1/2 inches in depth."

Issue:

Whether the picnic basket at issue is classifiable as "other baskets" or as "luggage" under subheading 4602.10, HTSUSA?

Law and Analysis:

For purposes of this discussion, we note that heading 4602, which provides for basket-work, wickerwork, and other articles made directly to shape from plaiting materials, is divided into two major parts: (I) of vegetable materials (4602.10) and (II) other (4602.90). The relevant first part (4602.10) is divided into four subparts: (1) fishing baskets and creels (4602.10.05); (2) other baskets and bags, whether or not lined (4602.10.07-4602.10.18); (3) luggage, handbags and flatgoods (4602.10.21-4602.10.29); and (4) other (4602.10.35-4602.10.80).

The rationale for classifying picnic baskets as luggage under subheading 4602.10, HTSUSA, was explained in Headquarters Ruling Letter (HRL) 954702, issued on August 16, 1994. That ruling correctly pointed out that the structure of heading 4602, HTSUSA, requires that baskets be classified separately from luggage, handbags, and flatgoods. However, in concluding that the picnic case there at issue was correctly classified as luggage (of plaiting materials), the following was stated: "By specifically listing luggage, handbags and the like separately from baskets, Congress demonstrated its intent to have articles used for the conveyance of items (which the picnic 'basket' clearly is) classified apart from mere

household containers constructed of plaiting materials." This statement implies that, for purposes of classification in heading 4602, HTSUSA, luggage is defined as *articles used for the conveyance of items*, and baskets are defined as *household containers constructed of plaiting materials*. We now believe that this definition of "luggage" is too broad, encompassing many articles that are not luggage, and this definition of "baskets" is too narrow, appearing to limit baskets to household containers that do not convey items. The result is a blurring of the heading's structural separation of baskets from luggage.

The definitions put forward in HRL 954702 permitted classification of the picnic basket/case as luggage. A picnic basket or case, being used outside the home, is not a household article, so it could not be classified as a basket. Also, since a picnic basket/case is an article that conveys items, it fit the broad definition of luggage. Yet, a close examination of the basket/case there at issue (as well as the picnic basket at issue in NYRL 894451 and picnic baskets/cases generally) reveals that its nature and character are more like those of baskets than of luggage. It is made of materials characteristic of picnic and other baskets. It is designed and used for carrying food, beverages, and utensils to picnics and picnic-like events (such as a day at the beach or outdoor concert). (Some baskets/cases of the general kind at issue contain lining and/or compartments or internal fittings to hold plastic dinnerware.) It is called a picnic basket. It is marketed as a picnic basket. In short, everything about this picnic basket/case, as well as picnic baskets generally, including that classified in NYRL 894451, suggests "basket." further, their construction is not sufficiently durable or flexible for use as luggage.

In *Royal Cathay Trading Co. v. United States*, 45 Cust. Ct. 99, C.D. 2206 (1960), a case where the United States Customs Court rejected Customs classification of suitcases and valises made of plaiting materials as baskets under the Tariff Schedules of the United States (TSUS), the court based its decision on the character of the articles there at issue. The court reasoned that while the suitcases and valises fit the broad definition of "baskets" put forward in *United States v. Byrnes & Co.*, 11 Ct. Cust. Appls. 68, T.D. 38728, the obvious character of these articles precluded their classification as such. The court looked to the nature and use of the articles to determine their character, and concluded that their character was not that of baskets, but was instead that of suitcases and valises.

Applying the rationale of the *Royal Cathay* opinion to the instant case, and to the matter of picnic baskets and cases generally, we believe that the character of these articles is more like that of baskets and less like that of luggage. Their nature and use establish their character as picnic baskets, and picnic baskets are not luggage. (See *H.J. Stotter, Inc. v. United States*, Court No. 92-03-00142, Slip op. 94-121, July 27, 1994 (CIT), 28 Cust. Bull., No. 33, p. 48, 52, quoting from *United States v. Quon Quon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959), for the proposition that evidence of use is often highly probative of an article's identity for tariff purposes.)

It is necessary then to set forth an interpretation of heading 4602, HTSUSA, that better distinguishes between baskets and luggage. Thus, we conclude that the "other baskets" subheadings under subheading 4602.10, HTSUSA, provide for all baskets, other than fishing baskets and creels, whether or not they are household articles and whether or not they are used to carry other articles. The "luggage, handbags, and flatgoods" subheadings under subheading 4602.10, HTSUSA, are limited to coverage of the named articles (subject to the *ejusdem generis* rule of statutory construction). We decline to broadly define luggage for purposes of heading 4602, HTSUSA, as simply containers used to carry other articles from place to place. To do so is to improperly encompass a wide variety of containers that do not remotely resemble luggage.

Based on the foregoing, we conclude that the picnic basket at issue in NYRL 894451 is classifiable as an other basket of vegetable plaiting materials, rather than as luggage. The precise subheading applicable to the basket depends on its material composition. As stated in the "FACTS" section, the picnic basket here is made of woven strips of chipwood.

Holding:

The picnic basket at issue, classified in NYRL 894451 as luggage of vegetable plaiting materials, is instead classifiable in subheading 4602.10.1800, HTSUSA, as an other basket of vegetable plaiting materials, other, other. The applicable duty rate is 4.5% *ad valorem*.

Accordingly, NYRL 894451 is hereby modified.

JOHN DURANT,

Director,

Commercial Rulings Division.

[ATTACHMENT I]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC

CLA-2 R:C:T 957999 BC

Category: Classification

Tariff No. 4602.10.1600

CONTINENTAL SHELF CO.
631 Lupine Valley Rd.
Aptos, CA 95003

Re: Reconsideration of NYRL 894011; classification of a picnic basket made of plaiting materials; other baskets; luggage.

DEAR MR. VORIS:

Recently, Customs has had occasion to review the matter of classification of picnic baskets and cases made of plaiting materials. We have determined that baskets and cases of the class or kind principally used as picnic baskets are classifiable as "other baskets," rather than as "luggage," under subheading 4602.10, HTSUSA. Consequently, we hereinbelow modify New York Ruling Letter (NYRL) 894011, issued to you on January 28, 1994.

Facts:

On January 28, 1994, Customs issued NYRL 894011, classifying picnic baskets in subheading 4602.10.2500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for luggage of vegetable plaiting materials, of rattan or of palm leaf. The ruling described the baskets as having hinged lids, an over-the-top handle style, and a clasp closure mechanism.

Issue:

Whether the picnic baskets at issue are classifiable as "other baskets" or as "luggage" under subheading 4602.10, HTSUSA?

Law and Analysis:

For purposes of this discussion, we note that heading 4602, which provides for basket-work, wickerwork, and other articles made directly to shape from plaiting materials, is divided into two major parts: (I) of vegetable materials (4602.10) and (II) other (4602.90). The relevant first part (4602.10) is divided into four subparts: (1) fishing baskets and creels (4602.10.05); (2) other baskets and bags, whether or not lined (4602.10.07-4602.10.18); (3) luggage, handbags and flatgoods (4602.10.21-4602.10.29); and (4) other (4602.10.35-4602.10.80).

The rationale for classifying picnic baskets as luggage under subheading 4602.10, HTSUSA, was explained in Headquarters Ruling Letter (HRL) 954702, issued on August 16, 1994. That ruling correctly pointed out that the structure of heading 4602, HTSUSA, requires that baskets be classified separately from luggage, handbags, and flatgoods. However, in concluding that the picnic basket there at issue was correctly classified as luggage (of plaiting materials), the following was stated: "By specifically listing luggage, handbags and the like separately from baskets, Congress demonstrated its intent to have articles used for the conveyance of items (which the picnic 'basket' clearly is) classified apart from mere household containers constructed of plaiting materials." This statement implies that, for purposes of classification in heading 4602, HTSUSA, luggage is defined as *articles used for the conveyance of items*, and baskets are defined as *household containers constructed of plaiting materials*. We now believe that this definition of "luggage" is too broad, encompassing many articles that are not luggage, and this definition of "baskets" is too narrow, appearing to limit baskets to household containers that do not convey items. The result is a blurring of the heading's structural separation of baskets from luggage.

The definitions put forward in HRL 954702 permitted classification of the picnic basket/case as luggage. A picnic basket/case, being used outside the home, is not a household article, so it could not be classified as a basket. Also, since a picnic basket/case is an article that conveys items, it fit the broad definition of luggage. Yet, a close examination of the picnic basket/case there at issue (as well as the picnic baskets at issue in NYRL 894011 and such baskets/cases generally) reveals that its nature and character are more like those of baskets than of luggage. It is made of materials characteristic of picnic and other baskets. It

is designed and used for carrying food, beverages, and utensils to picnics and picnic-like events (such as a day at the beach or outdoor concert). It is called a picnic basket. It is marketed as a picnic basket. In short, everything about this picnic basket/case, as well as picnic baskets generally, including those at issue in NYRL 894011, suggests "basket." Further, their construction is not sufficiently durable or flexible for use as luggage.

In *Royal Cathay Trading Co. v. United States*, 45 Cust. Ct. 99, C.D. 2206 (1960), a case where the United States Customs Court rejected Customs classification of suitcases and valises made of plaiting materials as baskets under the tariff Schedules of the United States (TSUS), the court based its decision on the character of the articles there at issue. The court reasoned that while the suitcases and valises fit the broad definition of "baskets" put forward in *United States v. Byrnes & Co.*, 11 Ct. Cust. Appls. 68, T.D. 38728, the obvious character of these articles precluded their classification as such. The court looked to the nature and use of the articles to determine their character, and concluded that their character was not that of baskets, but was instead that of suitcases and valises.

Applying the rationale of the *Royal Cathay* opinion to the instant case, and to the matter of picnic baskets and cases generally, we believe that the character of these articles is more like that of baskets and less like that of luggage. Their nature and use establish their character as picnic baskets, and picnic baskets are not luggage. (see *H.J. Stotter, Inc. v. United States*, Court No. 92-03-00142, Slip op. 94-121, July 27, 1994 (CIT), 28 Cust. Bull., No. 33, p. 48, 52, quoting from *United States v. Quon Quon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959), for the proposition that evidence of use is often highly probative of an article's identity for tariff purposes.)

It is necessary then to set forth an interpretation of heading 4602, HTSUSA, that better distinguishes between baskets and luggage. Thus, we conclude that the "other baskets" subheading, 4602.10, HTSUSA, provides for all baskets, other than fishing baskets and creels, whether or not they are household articles and whether or not they are used to carry other articles. The "luggage, handbags, and flatgoods" subheading is limited to coverage of the named articles (subject to the *ejusdem generis* rule of statutory construction). We decline to broadly define luggage for purposes of heading 4602, HTSUSA, as containers used to carry other articles from place to place. To do so is to improperly encompass a wide variety of containers that do not remotely resemble luggage.

Based on the foregoing, we conclude that the picnic baskets at issue in NYRL 894011 are classifiable as "other baskets" of vegetable plaiting materials, rather than as luggage. The precise subheading applicable to the baskets depends on their material composition. As stated in the "FACTS" section, the picnic baskets are made of rattan and/or palm leaf.

Holding:

The picnic baskets at issue, classified in NYRL 894011 as luggage of vegetable plaiting materials, are instead classifiable in subheading 4602.10.1600, HTSUSA, as other baskets of vegetable plaiting materials, of rattan or of palm leaf, other. The applicable duty rate is 7% *ad valorem*. Since the baskets are imported from Mexico, we note that for baskets that qualify as goods of a signatory country to the North American Free Trade Agreement (NAFTA), the duty rate is "Free."

Accordingly, NYRL 894011 is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT J]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC

CLA-2 R:C:T 957995 BC

Category: Classification

Tariff No. 4602.10.1200

JULIA E. HARTENFELS
WILLIAM B. SKINNER, INC.
HEMISPHERE CENTER
Routes 1 and 9 South
Newark, NJ 07114

Re: Reconsideration of NYRL 866788; classification of a picnic basket made of plaiting materials; other baskets; luggage.

DEAR MS. HARTENFELS:

Recently, Customs has had occasion to review the matter of classification of picnic baskets and cases made of plaiting materials. We have determined that baskets and cases of the class or kind principally used as picnic baskets are classifiable as "other baskets," rather than as "luggage," under subheading 4602.10, HTSUSA. Consequently, we hereinbelow modify New York Ruling Letter (NYRL) 866788, issued to you on September 24, 1991.

Facts:

On September 24, 1991, Customs issued NYRL 866788, classifying a picnic basket in subheading 4602.10.2200, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for luggage of vegetable plaiting materials, of willow. The ruling described the basket as follows: "The submitted sample, item #W098, is a picnic basket constructed of 100% willow with a removable textile man-made lining for easy cleaning." The basket was oval in shape, had a handle that extended over the top center of the basket, and had lift-up flaps on either side.

Issue:

Whether the picnic basket at issue is classifiable as "other baskets" or as "luggage" under subheading 4602.10, HTSUSA?

Law and Analysis:

For purposes of this discussion, we note that heading 4602, which provides for basket-work, wickerwork, and other articles made directly to shape from plaiting materials, is divided into two major parts: (I) of vegetable materials (4602.10) and (II) other (4602.90). The relevant first part (4602.10) is divided into four subparts: (1) fishing baskets and creels (4602.10.05); (2) other baskets and bags, whether or not lined (4602.10.07-4602.10.18); (3) luggage, handbags and flatgoods (4602.10.21-4602.10.29); and (4) other (4602.10.35-4602.10.80).

The rationale for classifying picnic baskets as luggage under subheading 4602.10, HTSUSA, was explained in Headquarters Ruling Letter (HRL) 954702, issued on August 16, 1994. That ruling correctly pointed out that the structure of heading 4602, HTSUSA, requires that baskets be classified separately from luggage, handbags, and flatgoods. However, in concluding that the picnic case there at issue was correctly classified as luggage (of plaiting materials), the following was stated: "By specifically listing luggage, handbags and the like separately from baskets, Congress demonstrated its intent to have articles used for the conveyance of items (which the picnic 'basket' clearly is) classified apart from mere household containers constructed of plaiting materials." This statement implies that, for purposes of classification in heading 4602, HTSUSA, luggage is defined as *articles used for the conveyance of items*, and baskets are defined as *household containers constructed of plaiting materials*. We now believe that this definition of "luggage" is too broad, encompassing many articles that are not luggage, and this definition of "baskets" is too narrow, appearing to limit baskets to household containers that do not convey items. The result is a blurring of the heading's structural separation of baskets from luggage.

The definitions put forward in HRL 954702 permitted classification of the picnic basket/case as luggage. A picnic basket or case, being used outside the home, is not a household article, so it could not be classified as a basket. Also, since a picnic basket/case is an article

that conveys items, it fit the broad definition of luggage. Yet, a close examination of the basket/case there at issue (as well as the picnic basket at issue in NYRL 866788 and picnic baskets/cases generally) reveals that its nature and character are more like those of baskets than of luggage. It is made of materials characteristic of picnic and other baskets. It is designed and used for carrying food, beverages, and utensils to picnics and picnic-like events (such as a day at the beach or outdoor concert). It is called a picnic basket. It is marketed as a picnic basket. In short, everything about this picnic basket/case, as well as picnic baskets generally, including the basket at issue in NYRL 866788, suggests "basket." Further, their construction is not sufficiently durable or flexible for use as luggage.

In *Royal Cathay Trading Co. v. United States*, 45 Cust. Ct. 99, C.D. 2206 (1960), a case where the United States Customs Court rejected Customs classification of suitcases and valises made of plaiting materials as baskets under the Tariff Schedules of the United States (TSUS), the court based its decision on the character of the articles there at issue. The court reasoned that while the suitcases and valises fit the broad definition of "baskets" put forward in *United States v. Byrnes & Co.*, 11 Ct. Cust. Appls. 68, T.D. 38728, the obvious character of these articles precluded their classification as such. The court looked to the nature and use of the articles to determine their character, and concluded that their character was not that of baskets, but was instead that of suitcases and valises.

Applying the rationale of the *Royal Cathay* opinion to the instant case, and to the matter of picnic baskets and cases generally, we believe that the character of these articles is more like that of baskets and less like that of luggage. Their nature and use establish their character as picnic baskets, and picnic baskets are not luggage. (See *H.J. Stotter, Inc. v. United States*, Court No. 92-03-00142, Slip op. 94-121, July 27, 1994 (CIT), 28 Cust. Bull., No. 33, p. 48, 52, quoting from *United States v. Quon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959), for the proposition that evidence of use is often highly probative of an article's identity for tariff purposes.)

It is necessary then to set forth an interpretation of heading 4602, HTSUSA, that better distinguishes between baskets and luggage. Thus, we conclude that the "other baskets" subheadings under subheading 4602.10, HTSUSA, provide for all baskets, other than fishing baskets and creels, whether or not they are household articles and whether or not they are used to carry other articles. The "luggage, handbags, and flatgoods" subheadings under subheading 4602.10, HTSUSA, are limited to coverage of the named articles (subject to the *ejusdem generis* rule of statutory construction). We decline to broadly define luggage for purposes of heading 4602, HTSUSA, as containers used to carry the articles from place to place. To do so is to improperly encompass a wide variety of containers that do not remotely resemble luggage.

Based on the foregoing, we conclude that the picnic basket at issue in NYRL 866788 is classifiable as an other basket of vegetable plaiting materials, rather than as luggage. The precise subheading applicable to the basket depends on its material composition. As stated in the "Facts" section, the picnic basket here is made of 100% willow.

Holding:

The picnic basket at issue, classified in NYRL 866788 as luggage of vegetable plaiting materials, is instead classifiable in subheading 4602.10.1200, HTSUSA, as an other basket of vegetable plaiting materials, of willow. The applicable duty rate is 5.8% *ad valorem*.

Accordingly, NYRL 866788 is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.



United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge
Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein

Clerk
Joseph E. Lombardi



Decisions of the United States Court of International Trade

(Slip Op. 95-103)

EARTH ISLAND INSTITUTE, A CALIFORNIA NONPROFIT CORPORATION, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A NEW YORK NONPROFIT CORPORATION, THE HUMANE SOCIETY OF THE UNITED STATES, A DELAWARE NONPROFIT CORPORATION, THE SIERRA CLUB, A CALIFORNIA NONPROFIT CORPORATION, AND THE GEORGIA FISHERMEN'S ASSOCIATION, INC., A GEORGIA CORPORATION, PLAINTIFFS *v.* WARREN CHRISTOPHER, SECRETARY OF STATE, ROBERT E. RUBIN, SECRETARY OF TREASURY, ELINOR G. CONSTABLE, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS, INTERNATIONAL ENVIRONMENTAL, AND SCIENTIFIC AFFAIRS, RONALD BROWN, SECRETARY OF COMMERCE, AND ROLLAND A. SCHMITTEN, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, DEFENDANTS, AND NATIONAL FISHERIES INSTITUTE, INC., INTERVENOR-DEFENDANT

Court No. 94-06-00321

[Defendants' motion for partial summary judgment denied.]

(Dated June 5, 1995)

Heller, Ehrman, White & McAuliffe (Joshua R. Floum, Sylvia Quast and Nicole J. Walthall) and Eugene Underwood, Jr. for the plaintiffs.

Frank W. Hunger, Assistant Attorney General; *Lois J. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division (*Marc E. Montalbaine and Jeffrey M. Telep*) and Environment & Natural Resources Division (*James C. Kilbourne and Christiana P. Perry*), U.S. Department of Justice; and Office of the Legal Adviser, U.S. Department of State (*David Balton*) and Office of General Counsel, National Oceanic and Atmospheric Administration (*Jason Patlis*), of counsel, for the defendants.

Garvey, Schubert & Barer (Eldon V.C. Greenberg) for the intervenor-defendant.

OPINION AND ORDER

AQUILINO, Judge: Having moved successfully for dismissal of the claims pleaded by Earth Island Institute and its director of the Sea Turtle Restoration Project, Todd Steiner, in the U.S. District Court for the Northern District of California, No. C-92-0832 JPV, *aff'd*, *Earth*

Island Institute v. Christopher, 6 F.3d 648 (9th Cir. 1993), the defendants seek similar relief herein via an erroneously-styled Partial Motion to Dismiss. The decisions of those courts in California, familiarity with which is presumed, were to the effect that whatever federal subject-matter jurisdiction exists over plaintiffs' claims lies exclusively with this Court of International Trade pursuant to 28 U.S.C. § 1581(i)(3) and (4).

I

Counsel for the defendants chose to take issue with the plaintiffs by filing an answer to their current complaint before interposing the aforementioned motion, which, according to CIT Rule 12, is thus one for partial summary judgment under Rule 56 since it presents matters outside the pleadings within the meaning of that rule (although not the statement required by paragraph (i) thereof).

As submitted, the motion seeks discharge of all the named parties plaintiff save the Georgia Fishermen's Association, Inc. and of the Secretary of Commerce and the Assistant Administrator of the National Marine Fisheries Service as parties defendant on essentially the same ground, lack of standing to sue or be sued. The motion also seeks dismissal of the complaint insofar as it attempts to challenge the U.S. Department of State's certifications to Congress regarding the comparability of programs adopted by foreign countries to protect turtles from dangers inherent in trawling the seas for shrimp.

A

Such certifications emanate from an appropriations act for the Departments of Commerce and State, among others, Pub. L. No. 101-162, 103 Stat. 988 (1989), included in which was the following provision:

Sec. 609. (a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987—

(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;

(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;

(3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;

(4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea

turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and

(5) provide to the Congress by not later than one year after the date of enactment of this section—

(A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;

(B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and

(C) a full report on—

(i) the results of his efforts under this section; and

(ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

(b)(1) IN GENERAL.—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) CERTIFICATION PROCEDURE.—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course to such harvesting.

103 Stat. at 1037-38.

In concluding that this court has subject-matter jurisdiction, the California district court restricted its ruling to the foregoing section 609(b); it held there could be no judicial review under subsection (a) because the claims based thereon "raise issues relating to the foreign affairs function, which rests within the exclusive province of the Executive Branch." 6 F.3d at 650. A majority of the Ninth Circuit panel concurred that such review would violate the constitutional principle of separation of powers. *Compare id.* with 6 F.3d at 654-56 (Brunetti, J., dissenting in part).

Plaintiffs' current complaint abandons any claims for relief under section 609(a). *See, e.g.,* Plaintiffs' Memorandum in Opposition [to]

Defendants' Partial Motion to Dismiss, p. 7 n. 7. Among others, the claims for relief now are that this court (1) declare that the defendants have failed to implement the law, particularly the foregoing statute, by improperly confining its mandate to the Caribbean/Atlantic Ocean and failing to impose import prohibitions on shrimp and shrimp products; (2) declare that guidelines promulgated under the aegis of the Secretary of State are arbitrary and capricious and constitute an abuse of discretion; and (7) enjoin the defendants from allowing the importation of shrimp and shrimp products from any nation with commercial fishing operations which may adversely impact sea turtles unless and until the Secretary determines and certifies that the foreign nation has a current and enforceable sea-turtle-protection program and an incidental taking rate comparable to that of the United States.

B

The papers before the court portray five of the remaining seven species of sea turtles, namely, Kemp's ridley (*Lepidochelys kempi*), loggerhead (*Caretta caretta*), green turtle (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*) and leather-back (*Dermochelys coriacea*) as still found regularly within coastal waters of the United States. Though apparently coveted and thus captured and killed by *Homo sapiens* since the beginning of time, according to the complaint it is "widely believed by scientists studying sea turtle populations that the inadvertent capture of turtles in shrimp trawls is a major factor in the mortality and decimation of these species and significantly hinders recovery of their populations." That is, when nets are dragged through the seas, snaring marine life in their paths, turtles can and do become entangled therein and drown if trapped too long beneath the surface. Allegedly, the extent of this phenomenon caused the National Marine Fisheries Service, acting at the behest of the Secretary of Commerce, to conduct research which led by 1981 to development of turtle-excluder devices or "TEDs" capable of releasing turtles, but not shrimp, from trawls. Effective October 1, 1987, such devices became mandatory for U.S. shrimp trawlers in the Gulf of Mexico and the Atlantic Ocean off the southeastern United States. See *Sea Turtle Conservation; Shrimp Trawling Requirements*, 52 Fed.Reg. 24,244 (June 29, 1987).

Leatherback, hawksbill, Kemp's ridley and green turtles have been listed as "endangered" within the meaning of the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, while loggerhead is considered "threatened" under that statute, which provides:

§ 1538 Prohibited acts.

(a) Generally

(1) * * * [W]ith respect to any endangered species * * * listed pursuant to * * * this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species * * * listed pursuant to * * * this title and promulgated by the Secretary pursuant to authority provided by this chapter.

Section 609 of the 1989 enactment, *supra*, has been placed by its drafters as a note to the section of this act, 1537, on international cooperation. See 103 Stat. at 1037.

C

In December 1990, the President delegated to the Secretary of State the functions vested in him by section 609(b)¹, whereupon *Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines* were published, 56 Fed.Reg. 1051 (Jan. 10, 1991). Effective February 18, 1993, they were revised "to bring them into line with the U.S. domestic program in light of recent changes in U.S. regulations which considerably expanded the TEDs requirement in the United States shrimp fishery." *Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed.Reg. 9,015, 9,016 (Feb. 18, 1993). Those domestic changes, "with some very limited exemptions", were to the effect that,

beginning January 1, 1993, all U.S. commercial shrimp trawl vessels in the waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas must use TEDs at all times in all areas.

Id. In the revisions, the Department of State explains (per its Bureau of Oceans and International Environmental and Scientific Affairs) that it had determined that the scope of section 609, *supra*, is the wider Caribbean/western Atlantic region, which encompasses accordingly Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Surinam, French Guiana and Brazil. See *id.* at 9,015, 9,016. This geographic array was thereupon placed on notice that

protective measures for sea turtles should be implemented throughout the year in all * * * areas of the Caribbean and western Atlantic. The Department will continue to follow and review the results of research efforts and, if it is demonstrated conclusively

¹See *Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the United States*, 56 Fed.Reg. 357 (Jan. 4, 1991).

that there are times and areas where sea turtles are not present, will consider modifying the certification requirements for that particular area. (As has been its practice in the past, the Department will make any such decisions after technical consultations with the National Marine Fisheries Service.) However, no such areas or times can be delineated at the present time and[,] in the absence of any such data, 100 percent TEDs use is the standard by which the Department will determine comparability of foreign programs with the U.S. program.

Accordingly, the revised guidelines provide that, to receive a certification in 1993, affected nations must maintain their commitment to require TEDs on all commercial shrimp trawl vessels by May 1, 1994. In addition, they must be able to demonstrate the use of TEDs on a significant number of shrimp trawl vessels by May 1, 1993. To receive a certification in 1994 and in subsequent years, affected nations must require the use of TEDs on all of their shrimp trawl vessels.

Id. at 9,016-17. The precise revisions are set forth following this pronouncement, *id.* at 9,017.

In support of their motion for partial summary judgment, the defendants have submitted copies of the required, annual certifications to Congress pursuant to section 609(b)(2), *supra*, for the years ended April 30, 1991 to 1994. Purporting to rely on the guidelines then in effect, the Department of State certification was affirmative for the first year as to all countries save Surinam, which did not submit the "required documentary evidence"², whereupon the Secretary of the Treasury was notified that imports of shrimp from that country were to be prohibited effective May 1, 1991. *See* Defendants' Appendix 2, p. 3. In 1992, French Guiana supplanted Surinam for such prohibition, while in 1993 and again last year both countries were subject to the embargo plus Trinidad and Tobago for each of those years along with Honduras in 1993. Costa Rica and Guatemala were passed for each of the four years upon representation(s) that they have commercial shrimp fisheries which are conducted solely on the Pacific coast without any fishing activity in the Caribbean. *See, e.g., id.* at 2.

The plaintiffs allege in paragraph 32 of their complaint that the

defendants have improperly allowed the continued import of shrimp and shrimp products from Brazil * * *. In fact, defendants granted Brazil yet another extension of 6 months to come into compliance with the sea turtle safety comparability requirement without imposing importation restrictions on Brazilian shrimp and shrimp products, despite clear provisions to the contrary in the Act and in their own Guidelines.

Paragraph 28 of that pleading avers that the

Secretary of Commerce, acting through NMFS, determined on February 8, 1990 that over 150 countries or territories have commercial fishing operations which may adversely affect sea turtles and

² Defendants' Appendix 2, p. 3.

that roughly 70 of these nations exported shrimp to the United States in 1987-1988. The restriction of the January 10, 1991 Guidelines to nations in the wider Caribbean directly contradicts the requirements and directives of the Act to protect sea turtle species wherever they may be found. Subsequent agency actions have failed to cure these Guidelines.

II

Obviously, these allegations are material to plaintiffs' asserted causes of action, and defendants' denial thereof in their answer hardly leaves them susceptible to disposition by way of a motion for summary judgment. Nonetheless, the defendants take the position in their motion that plaintiffs' challenge to the Secretary of State's certifications should be dismissed as a matter of law since

[s]ection 609 contains no provision for judicial review of the * * * certifications and none of plaintiffs' claims arises under the Endangered Species Act. Therefore, judicial review of plaintiffs' claims must exist, if at all, pursuant to the APA, 5 U.S.C. § 701. However, the APA is not available to allow review of challenges to reporting requirements between the Executive Branch and Congress.

Defendants' Memorandum, p. 2. In other words, plaintiffs' challenge is not justiciable.

On its face, this position appears to disregard the decision(s) of the California courts which did hold that section 609(a), *supra*, which mandates executive-branch negotiations with foreign sovereigns and reporting thereon to the Congress, is beyond the hale of the judiciary but also that "[t]he prohibitions on shrimp importation for environmental protection in this case clearly fall within the range of CIT jurisdiction identified by the Supreme Court in *K Mart [Corp. v. Cartier, Inc.]*, 485 U.S. 176 (1988)]", to quote from *Earth Island Institute v. Christopher*, 6 F.3d at 652. The published decision of the Ninth Circuit does not recognize any restriction on this court's jurisdiction over claims arising from section 609(b).

Defendants' position also appears to disregard the fact that the plaintiffs are not alleging a violation of the requirement that Congress be informed. *See, e.g.*, Plaintiffs' Memorandum, p. 11. Rather, they

claim that defendants * * * *did not make* the comparability findings (one way or another) for all "vessels of the harvesting nations" as is plainly required by Section 609(b) * * *. [T]he agencies did not apply the requisite standards at all to the Pacific fleets.

Id. (emphasis in original). If this is their precise point, the court joins the defendants in failing to comprehend plaintiffs' disclaimer that they "*do not challenge the factual contents of any given certification*". *Id.* at 12 n. 11 (emphasis in original). *Cf., e.g.*, complaint para. 32, *supra*. Perhaps, their reading of the cases upon which the defendants rely, namely, *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288 (D.C.Cir. 1988), *Taylor Bay Protective Ass'n v. Administrator, U.S. Environmen-*

tal Protection Agency, 884 F.2d 1073 (8th Cir. 1989), *Greenpeace USA v. Stone*, 748 F.Supp. 749 (D.Haw. 1990), and *Natural Resources Defense Council v. Lujan*, 768 F.Supp. 870 (D.D.C. 1991), is the reason, for each of these decisions is that a reporting provision to Congress is not susceptible to judicial intervention. But, on their part, the defendants do concede that, to the

extent that plaintiffs are really arguing that they take issue with the certification of certain nations because that certification is based on an impermissible construction of Section 609(b) (the Pacific fleet example) this claim should be heard solely within plaintiffs' existing claim that the Guidelines are *ultra vires*. Federal defendants have not challenged the reviewability of that claim.

Defendants' Reply Memorandum, p. 5 n. 4.

Whatever nuances the parties attempt to engender, the Supreme Court has noted that judicial review of agency action "is available absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 231 n. 4 (1986), citing *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). No such legislative intent is discernible from section 609 on its face, *supra*, or from the history underlying its enactment, while the certifications resulting therefrom appear merely to be evidence relevant to disposition of this action.

In reviewing the claims in *Japan Whaling Ass'n* challenging compliance with the so-called Pelly Amendment to the Fishermen's Protective Act of 1967 and the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, the Supreme Court relied on the Administrative Procedure Act, in particular, 5 U.S.C. § 706(1) or § 706(2)(A). *See id.* Not only do the plaintiffs rely on the APA in this similar kind of action, they take the position that it is also subject to judicial review under the citizen-suits provision of the Endangered Species Act ("ESA"). Their premise is that section 609 is a part of that statute by dint of its adoption as a note to the codified ESA provision on international cooperation, 16 U.S.C. § 1537.

The defendants counter that such placement does not mean that Congress amended ESA when it enacted section 609 and also that amendments by implication are disfavored, while the intervenor-defendant adds that location does not confer meaning and any inference regarding the substance of a provision must be founded upon more than its placement or labelling. The court concurs, but this agreement is not dispositive, for it seems that section 609 does supplement ESA. Stated another way, neither conflicts with the other; they can, if not should, be read in *pari materia*. For example, ESA section 1537(b) provides that the Secretary of Commerce, acting through the Secretary of State, shall encourage (1) foreign countries to provide for the conservation of endangered species and (2) the entering into of bilateral or multilateral agreements

with them to provide for such conservation, while section 609(a)(1), 16 U.S.C. § 1537 note, adds that the Secretary of State, in consultation with his counterpart at Commerce, pursue such agreements "as soon as possible" with regard to the endangered species of sea turtles. *Cf.* 16 U.S.C. § 1540(h), entitled "Coordination with other laws", including the Tariff Act of 1930, as amended.

As indicated, ESA is possessed of a provision for lawsuits brought by citizens against the sovereign, essentially 16 U.S.C. § 1540(g)(1), subject to conditions specified in subsections (2) and, to a lesser extent, (3). One is that no suit commence prior to expiration of 60 days after written notice of an alleged violation under the act has been given to the government. The defendants now claim refuge under this precondition, but none can be found in view of the specific notice plaintiffs Earth Island Institute and Steiner provided via service and filing of their complaint in February 1992 in the California district court, the first paragraph of which alleged failure by the defendant Secretary of State *et alia* "to comply with and implement the clear mandate and requirement" of ESA and section 609 cited as the codified note thereto "to protect and conserve sea turtles from harm associated with shrimp fishing".³

III

The motion at bar seeks dismissal of the complaint as against defendants Ronald Brown and Rolland A. Schmitten. It also seeks dismissal from the action of all the "environmental plaintiffs", as they are characterized in defendants' supporting memoranda.

A

Paragraph 19 of the complaint alleges that defendant Brown, who is being sued in his official capacity as Secretary of Commerce, is charged by the governing act along with the Secretary of State with implementation of measures for the international protection and conservation of sea turtles, while paragraph 20 avers that defendant Schmitten, who is being sued in his official position of Assistant Administrator for Fisheries, National Marine Fisheries Service⁴, "has been given the task and responsibility of developing technical and certification procedures for implementation of Pub. L. 101-162."

The answer which has been interposed to these allegations admits that each of these two named defendants "exercises certain responsibilities" under that statute, but only section 609(a) thereof; they thus deny

³Section 1540 also provides for jurisdiction in the district courts which, no doubt, led to commencement of the action in San Francisco first. As recited, the district court and then the court of appeals there held that jurisdiction over the pleaded subject matter is exclusively within this national Court of International Trade. Compare *Earth Island Institute v. Christopher*, 6 F3d 648 (9th Cir. 1993), *passim* with 16 U.S.C. § 1540 (c) and (g)(1) and 28 U.S.C. § 451. See also *Northwest Resources Information Center, Inc. v. Nat'l Marine Fisheries Service*, 25 F3d 872, 875 (9th Cir. 1994) (ESA an act of "general character governing citizen suits" which does not take precedence over more-explicit jurisdictional enactments). *Cf. Village of Kaktovik v. Watt*, 689 F2d 222, 231-32 n. 76 (D.C.Cir. 1982).

⁴This Service is apparently under the National Oceanic and Atmospheric Administration, itself organized within the Department of Commerce.

any actionable involvement. Counsel argue in support of their motion that

neither the Secretary nor the Assistant Administrator has the authority or responsibility for the actions being challenged in this case, or the ability to grant the relief requested. Plaintiffs' claims arise solely under Pub. L. 101-162, Section 609(b). They have raised no claims under the ESA, and therefore authority and responsibility under that statute is irrelevant. With respect to the implementation of Section 609(b), neither the Secretary of Commerce nor the Assistant Administrator of NMFS has authority to make certifications to Congress or the power to impose embargoes. Furthermore, the Guidelines implementing Section 609(b) were promulgated solely by State. Therefore, no basis exists for keeping Commerce in this case.

Defendants' Reply Memorandum, p. 3 n. 2.

This position may prove well-founded after discovery and development of all the material facts, but the court is not at liberty to grant the requested, summary relief based on the paucity of such facts already presented. Moreover, contrary to the foregoing argument that the "plaintiffs have raised no claims under the ESA", that act is part of their complaint *passim*, commencing with the very first paragraph thereof.

B

The complaint's paragraph 14 portrays the plaintiff Georgia Fishermen's Association, Inc. ("GFA") as established in 1974 under the laws of that state as an

organization of commercial fishermen, seafood packers, and suppliers primarily involved in the production and sale of shrimp harvested from the Southeastern Atlantic coast of the United States * * * formed to more efficiently deal with issues facing the commercial shrimp fishing industry, such as fair pricing for their product and compliance with state and federal regulations.

The next paragraph alleges, among other things, that defendants' failure to carry out the law has adversely affected the ability of GFA members to compete with shrimp caught by foreign fleets and then exported to the United States.

Defendants' instant motion is not aimed at GFA, whereupon its co-plaintiffs argue that, if at least one party plaintiff has standing to proceed, a court need not decide whether or not other named plaintiffs can also continue, citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 n. 9 (1977). Clearly, counsel for the defendants are cognizant of this approach and subsequent, similar rulings in *Watt v. Energy Educational Foundation*, 454 U.S. 151, 161 (1981), and *Gen'l Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 402 n. 22 (1982), among other cases, nor do they gainsay that the complaint "identifies a cognizable injury on the part of the environmental plaintiffs (their ability to observe sea turtles)". Defendants' Reply

Memorandum, p. 11. Rather, their contention is that plaintiffs' pleaded posture

fails to demonstrate a causal connection between this [admitted] injury and the allegedly illegal conduct of the defendants (failure to embargo shrimp imports), and further fails to establish that relief from this injury is likely to follow from a decision in their favor.

Id. See generally Defendants' Memorandum, pp. 21-28. In other words, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). In addition to pressing their position as to the causation and redressability required, the defendants argue that the interests of GFA and of the other plaintiffs are divergent:

Here, the interest of the environmental plaintiffs is the preservation of sea turtles. By contrast, the interest of the Georgia Fishermen is to avoid competition from foreign shrimp fishermen who do not operate under environmental regulations comparable to those in effect in the United States. Indeed, U.S. commercial shrimp fishermen, some of whom are members of the Georgia Fishermen, staunchly opposed the imposition of these environmental regulations on themselves * * *. From this, it would appear that the Georgia Fishermen have joined in this suit in the hopes of securing court-ordered embargoes against foreign competitors. By contrast, the environmental plaintiffs hope to influence foreign environmental practices through the threat of embargoes.

Defendants' Reply Memorandum, p. 18. In sum, "the issue of the environmental plaintiffs' standing must be reached." *Id.*

The court concurs. The only question is timing. Standing was the issue in another action brought under ESA by "organizations dedicated to wildlife conservation and other environmental causes", *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S.Ct. 2130, 2135 (1992), wherein the Court reiterated that a party invoking federal jurisdiction always bears the burden of establishing that it has suffered injury in fact, that there is a causal connection between that injury and the conduct complained of, and that that injury is likely to be redressed by a favorable decision. 504 U.S. at 560, 112 S.Ct. at 2136. Since these three elements

are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation * * *. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim," * * *. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere

allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(d), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial," * * *.

504 U.S. at 561, 112 S.Ct. at 2136-37, citing or quoting from *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871 (1990); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); and *Warth v. Seldin*, 422 U.S. 490 (1975).

As indicated at the beginning of this opinion, at the time the defendants interposed their instant motion, the status of this action was issue joined, thereby precluding relief simply pursuant to CIT Rule 12(b). Also, their submission of matters outside the pleadings transformed their motion from one for judgment thereon per Rule 12(c) into one for summary judgment under Rule 56. Paragraph (i) of that last rule mandates inclusion of "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried", but such a statement has not been forthcoming from the defendants.⁵

Be this as it may, defendants' answer places in issue each and every averment as to the named party plaintiffs described in paragraphs 4-15 of their complaint. Joinder of issue in this manner without more⁶ leaves the court unable to grant judgment as to them one way or the other. Such final relief must abide presentment of the material facts, if not their discovery. Suffice it to note for now that in *Jones v. Butz*, 374 F.Supp. 1284 (S.D.N.Y.), *aff'd*, 419 U.S. 806 (1974), a case challenging the act of August 27, 1958 to establish federal policy as to the use of humane methods of slaughter of livestock, 7 U.S.C. § 1901 *et seq.*, the courts sustained the standing of the plaintiffs, apparently including that of the first named as "the next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States"⁷ upon a conclusion that her "injury need not be large", to quote from the opinion of the threejudge district court, 374 F.Supp. at 1288 n. 5, citing *Baker v. Carr*, 369 U.S. 186 (1962); *McGowan v. Maryland*, 366 U.S. 420 (1961); and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

This court also notes that at least some of the plaintiffs now before it are not strangers to this kind of litigation. In *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581 (9th Cir. 1993), for example, the Sierra Club was found to have standing under both ESA section 1538 and APA section 702 upon a representation in the complaint that "the organizations [bringing suit] and their members derive scientific, recreational,

⁵ Recently, the plaintiffs filed a motion for summary judgment on the substantive issues raised by them but not under direct challenge in defendants' motion which is properly accompanied by a Rule 56(i) statement, as well as by affidavits from plaintiff Steiner and on behalf of plaintiff GFA, among others.

The defendants have moved for a stay of plaintiffs' motion pending resolution of the one at bar which has been granted.

⁶ Defendants' submission outside the pleadings does not shed any additional light on the issue of plaintiffs' standing.

⁷ 374 F.Supp. at 1284.

and aesthetic benefit and enjoyment from the existence in the wild of the Mt. Graham Red Squirrel." In *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991), the standing of the Institute to seek the enforcement of various provisions of the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 *et seq.*, especially those relating to the protection of dolphins, was not in dispute. Similarly, in *Japan Whaling Ass'n v. American Cetacean Soc'y*, *supra*, the standing of the Humane Society of the United States, *inter alia*, was implicitly adequate to seek relief against the Secretary of Commerce.

Nonetheless, the plaintiffs must also have standing herein, which is to be established at trial or otherwise. *See generally Nat'l Corn Growers Ass'n v. Baker*, 10 CIT 345, 636 F.Supp. 921 (1986), *rev'd on another ground*, 840 F.2d 1547 (Fed.Cir. 1988).

IV

In view of the foregoing, defendants' motion for partial summary judgment must be, and it hereby is, denied. Counsel for each of the parties are to confer and then file with the court on or before June 30, 1995 a proposed scheduling order, expediting pretrial preparations, submission of a pretrial order and then trial of this action. The stay of plaintiffs' motion for summary judgment is hereby extended until further direction of the court.

(Slip Op. 95-104)

NTN BEARING CORP OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP, AND NTN CORP, PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND RONALD H. BROWN, SECRETARY OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court Nos. 92-03-00168 and 92-04-00257

(Dated June 7, 1995)

JUDGMENT

TSOUALAS, *Judge*: On December 29, 1994, this Court, in Slip Op. 94-200, remanded to the Department of Commerce, International Trade Administration ("Commerce"), the final results of its third administrative review of certain tapered roller bearings, finished and unfinished, and parts thereof ("TRBs") from Japan, produced by NTN Bearing Corporation, and distributed by its subsidiary, NTN Bearing Corporation of America (collectively, "NTN"). *NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. v. United States*, 18 CIT ___, Slip Op. 94-200 (December 29, 1994). These final results covered the period October 1, 1989 through September 30, 1990.

Subsequently, on January 3, 1995, this Court issued Slip Op. 95-1, remanding to Commerce the amended determination for the same review. *NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. v. United States*, 19 CIT ___, Slip Op. 95-1 (January 3, 1995). Both orders directed Commerce (1) to impose a 10% limit upon the deviation factors in the five-criterion model-match methodology used in the final results for selecting the most similar home market TRB model; (2) to explain its reasons for not accepting NTN's compensating deposits; (3) to reconcile a discrepancy between the analysis memorandum and the computer programming language, and correct any potential error; and (4) to correct an acknowledged programming error.

On March 14, 1995, Commerce released draft remand results and invited the parties to comment on those results. None of the parties submitted comments regarding the draft remand results. On March 29, 1995, Commerce filed the final results with this Court. *Final Results of Redetermination Pursuant to Court Remand, NTN Bearing Corporation of America, American NTN Bearing Mfg. Corporation and NTN Corporation v. United States*, Slip Op. 94-200 (December 29, 1994) and Slip Op. 95-1 (January 3, 1995).

Commerce has complied with the instruction of this Court and this Court is satisfied with the explanations given by Commerce for their actions. The Court has considered all comments submitted by the parties and found their arguments to be without merit. Therefore, the final results of redetermination pursuant to this Court's remand are affirmed in all respects and these actions are dismissed.

(Slip Op. 95-105)

FORMER EMPLOYEES OF ROEDER HYDRAULICS, INC., PLAINTIFFS *v.*
U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 94-12-00769

[Defendant's motion to dismiss is granted. Judgment entered for defendant.]

(Dated June 8, 1995)

Charles L. Jordan and Mark Beauchamp, pro se, for plaintiffs.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Jeffrey M. Telep), for defendant.

MEMORANDUM AND OPINION

GOLDBERG, *Judge*: This matter is before the Court on defendant's motion to dismiss for lack of jurisdiction. Because the Court finds that it

lacks jurisdiction to entertain this action, the Court grants defendant's motion to dismiss.

BACKGROUND

On October 5, 1994, the United States Department of Labor ("Labor") published notice in the Federal Register of its final determination denying plaintiffs worker adjustment assistance pursuant to 19 U.S.C. § 2273 (1988). *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 59 Fed. Reg. 50,774, 50,775 (Oct. 5, 1994) ("Notice of Determination"). Labor denied plaintiffs worker adjustment assistance because it found that "increased imports did not contribute importantly to worker separations" at their firm. *Id.* at 50,774-75.

On or about December 4, 1994, plaintiffs sent a letter to this Court, via regular mail, asking for review of Labor's determination. See *Memorandum in Support of Defendant's Motion to Dismiss* ("Defendant's Motion"), Exhibit 2. The Office of the Clerk of the Court accepted plaintiffs' letter "as fulfilling in principle the requirements of the summons and complaint" for an action to review Labor's determination.¹ *Defendant's Motion*, Exhibit 3. The Office of the Clerk deemed the letter filed as of the date of its receipt, i.e. December 9, 1994. *Id.*

In response to plaintiffs' letter, defendant filed a motion to dismiss for lack of jurisdiction, arguing that plaintiffs had filed their action more than sixty days after Labor's final determination in violation of 19 U.S.C. § 2395(a) (1988 & Supp. V 1993). Plaintiffs failed to respond to defendant's motion.

DISCUSSION

Once Labor publishes notice in the Federal Register of a final determination denying worker adjustment assistance pursuant to 19 U.S.C. § 2273 (1988), the aggrieved workers may file an action seeking review of Labor's determination in this Court. 28 U.S.C. § 1581(d)(1) (1988); 19 U.S.C. § 2395(a) (1988 & Supp. V 1993). The workers must, however, commence their action "in accordance with the rules of the Court * * * within sixty days after the date of notice of such determination."² 28 U.S.C. § 2636(d) (1988); see also 19 U.S.C. § 2395(a) (1988 & Supp. V 1993). The Court cannot take a liberal view in calculating whether the

¹ In this case, defendant has not challenged the decision of the Office of the Clerk to accept plaintiffs' letter as fulfilling in principle the requirements of a summons and complaint for an action to review Labor's determination. The Court notes that the decision to treat a letter sent via regular mail in this manner has been approved of in the past. *Kelley v. Secretary, United States Dept. of Labor*, 5 Fed. Cir. (T) 87, 87-89, 812 F.2d 1378, 1380 (1987).

² The Court recognizes that this language from 28 U.S.C. § 2636(d) does not authorize it to enlarge or diminish its jurisdiction by way of its rules. This portion of § 2636(d) does, however, acknowledge that the rules of the Court set forth certain procedures that parties must follow in order to invoke properly the Court's jurisdiction within the 60 day time limit established by statute. Hence, § 2636(d) acknowledges that the Court's rules can affect the determination of whether or not the Court has jurisdiction over an action challenging a Labor determination rendered pursuant to 19 U.S.C. § 2273. See, e.g., *Waschko v. Donovan*, 4 CIT 271, 272 (1982); cf. *NEC Corp. v. United States*, 5 Fed. Cir. (T) 49, 50, 806 F.2d 247, 248-49 (1986) (in order for this Court to have jurisdiction over an antidumping action, plaintiff must file its summons in accordance with USCIT rules within the period statutorily designated for doing so); *Georgetown Steel Corp. v. United States*, 4 Fed. Cir. (T) 143, 146-49, 801 F.2d 1308, 1311-13 (1986) (in order for this Court to have jurisdiction over a countervailing duty action, plaintiff must file its complaint in accordance with USCIT rules within the period statutorily designated for doing so). But cf. *Pollak Import-Export Corp. v. United States*, 13 Fed. Cir. (T) _____, Slip Op. 94-1289 at 6, 19 U.S. App. LEXIS 7966 (Apr. 11, 1995) (finding that Congress did not intend to elevate compliance with all of the Court's rules governing the form and contents of a summons in a customs action into jurisdictional elements).

workers have commenced their action within sixty days of Labor's determination, even if the workers are acting *pro se*. *Kelley v. Secretary, United States Dept. of Labor*, 5 Fed. Cir. (T) 87, 89, 812 F.2d 1378, 1380 (1987). The Court simply has no jurisdiction to entertain the workers' action if they fail to commence it within the time in which the government has consented to be sued. *Id.*; *Waschko v. Donovan*, 4 CIT 271, 272 (1982).

In this case, Labor published the *Notice of Determination* on October 5, 1994. The Office of the Clerk received plaintiffs' letter requesting review of the determination via regular mail on December 9, 1994. Hence, according to the rules of the Court, plaintiffs filed their letter sixty-five days after the publication of Labor's *Notice of Determination*.³ Because plaintiffs failed to commence their action within the sixty day period in which the government has consented to be sued, the Court must dismiss the action for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, defendant's motion is granted. Judgment will be entered accordingly.

(Slip Op. 95-106)

NIPPON STEEL CORP., KAWASAKI STEEL CORP., KOBÉ STEEL, LTD., NISSHIN STEEL CO., LTD., NKK CORP., AND SUMITOMO METAL INDUSTRIES, LTD., ET AL., PLAINTIFFS v. UNITED STATES, DEFENDANT, AND U.S. STEEL GROUP—A UNIT OF USX CORP., AK STEEL CORP., GULF STATES STEEL, INC. OF ALABAMA, NATIONAL STEEL CORP., BETHLEHEM STEEL CORP., LTV STEEL CO., INC., INLAND STEEL INDUSTRIES, INC., SHARON STEEL CORP., AND WCI STEEL, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 93-09-00555-INJ

[Remand determination of the International Trade Commission sustained.]

(Dated June 9, 1995)

White & Case (Walter J. Spak, Christopher M. Curran and Lisa L. Hubbard) for plaintiff Industrias Monterrey, S.A. de C.V.

Lyn M. Schlitt, General Counsel, United States International Trade Commission, *James A. Toupin*, Deputy General Counsel (*Cynthia P. Johnson* and *James M. Lyons*) for defendant.

Dewey Ballantine (Alan Wm. Wolff and Michael H. Stein) and *Skadden, Arps, Slate, Meagher & Flom* (Robert E. Lighthizer and John J. Mangan) for defendant-intervenors U.S. Steel Group—a Unit of USX Corp.; AK Steel Corp.; Gulf States Steel, Inc. of Alabama; National Steel Corp.; Bethlehem Steel Corp.; LTV Steel Company, Inc.; Inland Steel Industries, Inc.; Sharon Steel Corp.; and WCI Steel, Inc.

³ See USCIT Rule 3(a) (providing that a civil action is commenced by filing a summons and complaint); USCIT Rule 5(e) (providing that filing is completed when received, except that a paper mailed by registered or certified mail properly addressed to the clerk, with the proper postage affixed and return receipt requested, is deemed filed as of the date of mailing).

OPINION

RESTANI, *Judge*: This matter is before the court following a remand order. See *Nippon Steel Corp. v. United States*, Slip Op. 95-57 (Apr. 3, 1995). The court remanded the original determination to enable Chairman Watson of the International Trade Commission ("Commission") to reconsider his determination with respect to cumulation of certain corrosion-resistant steel products from Mexico for present material injury analysis purposes. The court gave specific instructions that Chairman Watson re-evaluate his finding of negligibility as to Mexican products, that was expressed in his separate views concurring with the joint determination. See *Certain Flat-Rolled Carbon Steel Prods. from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, USITC Pub. No. 2664, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353, and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619, at 205 (Aug. 1993) (final determ.). Petitioners here contest the Commission's remand determination ("*Remand Det.*") dated May 4, 1995, on the basis that the full Commission was required to reconsider and re-issue its views on negligibility of Mexican imports.

The relevant statute provides that,

[i]f the final disposition of an action brought under this section is not in harmony with the published determination of * * * the Commission, the matter shall be remanded to * * * the Commission * * * for disposition consistent with the final disposition of the court.

19 U.S.C. § 1516a(c)(3) (1988). In the remand determination, Chairman Watson reconsidered the evidence regarding Mexican imports, and indicated his continuing full concurrence with the joint opinion, as to which the court found no error. *Remand Det.* at 1. The consideration of American Goods Returned, with which the court found fault and continues to do so, did not affect the outcome, as is now made clear by the revised determination *Id.*

Chairman Watson's revised views were circulated to the full Commission for a vote on the question of whether Chairman Watson's views would constitute the full response from the Commission to the court. See Attach. to Def.'s Resp. to Pls.' Objections to Commission's Remand Determination (action jacket approval record). The vote approved of the submission of the remand determination, consisting of Chairman Watson's views, without any additional text. *Id.*

Petitioners insist that each member of the Commission was compelled to reconsider and formulate written views on this issue.¹ In support, petitioners point chiefly to the holding in *Metallwerken Nederland B.V. v. United States*, 14 CIT 481, 744 F. Supp. 281 (1990). There the court had ordered that Commissioner Rohr reconsider his threat of material

¹ Whether every commissioner was permitted to reconsider his or her original analysis in the case of such a limited remand, and where the views at issue are clarified to indicate that the error noted was not determinative, is not before the court. Such a procedure was not utilized.

injury determination, and on remand, parties contested Commissioner Newquist's participation as outside the scope of the order. *Id.* at 489, 744 F. Supp. at 287. The court in *Metallwerken* held that the remand order was not directed to a single commissioner, but instead was intended for the entire Commission. *Id.* at 490, 744 F. Supp. at 288. In *Metallwerken*, the court did not reach the issue of whether Commissioner Newquist had exceeded the scope of the remand, but did determine that the Commission had broad discretion to fashion its procedures. *Id.*

The decision in *Metallwerken* does not stand for the proposition that on remand each commissioner must issue a written explanation of his or her views, after consideration of clarifications or revisions by another commissioner. See *Bando Chem. Indus., Ltd. v. United States*, Slip Op. 93-150 (Aug. 6, 1993) (sustaining remand determination, resulting from order directing only Commissioner Rohr to reconsider findings regarding threat of material injury), *aff'd without op.*, 26 F.3d 139 (Fed. Cir. 1994). The court here finds that the Commission's circulation and review of, and vote with regard to, Chairman Watson's clarified views constituted a complete response by the Commission to the remand order. The court further finds that such action was consistent with the requirements of the statute under the factual circumstances of this remand.

For these reasons, the court sustains the remand determination containing the clarified views of Chairman Watson regarding his negligibility determination as to Mexican corrosion-resistant steel products.





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